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IN THE

Supreme Court of the United States

OCTOBER TERM 1979

No. 79-105

CURTISS-WRIGHT CORPORATION,

Petitioner,

vs.

GENERAL ELECTRIC COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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The petitioner, Curtiss-Wright Corporation, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on April 17, 1979; Curtiss-Wright's petition for rehearing was denied on June 4, 1979.

Opinions Below

The opinions of the Court of Appeals for the Third Circuit and the District Court for the District of New Jersey appear in the Appendix hereto.

Jurisdiction

The judgment of the Court of Appeals for the Third Circuit was entered on April 17, 1979. A timely petition for rehearing was denied on June 4, 1979, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented

(1) Did the filing of a counterclaim deprive the district court of discretion to grant final certification of judgments in favor of petitioner, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, on claims factually and legally unrelated to the counterclaim even though the district court (a) determined that there was no just reason for delay and (b) provided a carefully considered written statement of all relevant factors supporting its entry of final judgment?

(2) Did the district court abuse its discretion by considering the economic loss of more than $1 million per year which would result from a failure to certify as a factor in favor of granting certification pursuant to Rule 54(b) of the Federal Rules of Civil Procedure?

Federal Rules of Civil Procedure Involved

The relevant Federal Rule of Civil Procedure is Rule 54(b) which states:

> (b) Judgment Upon Multiple Claims or Involving Mulitiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third party claim, or when multiple parties are involved, the court may direct the entry of final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Statement of the Case

Between May 1, 1968 and December 21, 1972, Curtiss-Wright Corporation ("Curtiss-Wright") entered into a series of 21 military procurement subcontracts with General Electric ("GE"), a prime contractor for the United States Navy. The subcontracts called for Curtiss-Wright to manufacture and deliver 167 large components designed for use in nuclear powered naval vessels. Although Cur-

tiss-Wright has completed the manufacture and delivery of all of the components in conformity with contract specifications, GE has withheld $18,914,408.00 of the contract price. The amount of this unpaid contract balance is not in dispute.

In connection with these subcontracts, Curtiss-Wright brought suit, pursuant to the district court's diversity jurisdiction, against GE alleging fraud, misrepresentation and contractual breaches and seeking damages and reformtion of the subcontracts. In addition, Curtiss-Wright sought payment from GE of the outstanding contract balance—$18,914,408.00. GE, for its part, interposed counterclaims based upon alleged extraordinary assistance rendered by GE to Curtiss-Wright.

The district court granted Curtiss-Wright's motions for summary judgment on those counts of the Complaint which sought to recover the unpaid contract balance of $18,914,408.00 (App. A at 1a). Thereafter, the district court certified these judgments as final and made both (a) the "express direction" for entry of judgment and (b) the determination that there was "no just reason for delay" as required by Rule 54(b) of the Federal Rules of Civil Procedure ("Rule 54(b)") (App. A at 10a, 14a).

In an opinion issued concurrently with its order of final certification, the district court provided a carefully reasoned statement in support of its decision to direct entry of final judgment (App. A at 10a). *Inter alia,* the court concluded:

> (1) Certification could not, in any way, result in unnecessary appellate review;
>
> (2) The claims on which certification was granted are separate, distinct, and independent of any of

the other claims or counterclaims involved in the lawsuit;

(3) Certification will not prevent the rest of the case being prepared for trial;

(4) The need for appellate review of the claims on which certification was granted will not be mooted by any future developments in the district court;

(5) The determinations by the district court regarding the claims on which certification was granted will not be changed by later developments in the district court;

(6) Justice to the litigants will be advanced by certification because (a) with prejudgment interest fixed by law at 6 percent simple interest, under modern-day interest rates Curtiss-Wright will suffer daily financial losses ($3,000.00 per day) from the non-payment of the liquidated debts embodied in the certified judgments and (b) due to the complex nature of the remaining claims in suit the delay in payment which would result from a failure to certify would span many months, if not years.

(7) Curtiss-Wright is financially sound and will be able to satisfy a judgment on GE's counterclaim should such a judgment ever be entered.

(8) In the opinion of the district court, all of the above factors in favor of certification outweighed the presence of GE's counterclaim.

The Court of Appeals for the Third Circuit, with one judge dissenting, reversed the district court with the direction to vacate so much of the lower court's judgment as purported to render a final judgment pursuant to

Rule 54(b) (App. B at 17a). The court held that the existence of a pending counterclaim bars Rule 54(b) certification absent "unusual or harsh circumstances." The court also held that the economic loss to Curtiss-Wright which would result from a failure to certify, as described by the district court, could never constitute "unusual or harsh circumstances" justifying the entry of Rule 54(b) certification (App. B at 21a-22a). Curtiss-Wright's petition for rehearing was denied, although four judges voted for the rehearing, three against with two judges recusing themselves (App. C at 37a).

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with decisions of the United States Supreme Court as to the proper interpretation of Rule 54(b).

Rule 54(b) of the Federal Rules of Civil Procedure provides that the district court may grant final judgment as to one or more but fewer than all of the claims in a case involving multiple claims, provided that the court makes an express determination that there is no just reason for delay and an express direction for entry of judgment.

In the present case, the court of appeals, purporting to rely on its earlier decision in *Allis-Chalmers* v. *Philadelphia Electric Co.*, 521 F.2d 360 (3d Cir. 1975), held that the existence of GE's counterclaim constituted an absolute bar to Rule 54(b) certification absent "unusual or harsh circumstances." The majority opinion did not undertake to define "unusual or harsh circumstances" except to state that the loss in interest to Curtiss-Wright (approximately $1 million per year) is not such a circumstance.*

The holding of the court of appeals in this case and in *Allis-Chalmers,* as interpreted by the majority opinion below, are in direct conflict with the interpretation given to Rule 54(b) by the United States Supreme Court the last time the Court considered the purpose of the Rule, 23 years ago. *See Cold Metal Process Co.* v. *United Engineering & Foundry Co.*, 351 U.S. 445 (1956); *Sears, Roebuck & Co.* v. *Mackey,* 351 U.S. 427 (1956).

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* In *Allis-Chalmers* itself the court denoted miscellaneous considerations including economic factors, that could constitute "unusual or harsh circumstances," but left the district courts with no indication of how or when to apply these factors. 521 F.2d at 366 & n.14.

In *Sears, Roebuck & Co.* v. *Mackey, supra,* the Supreme Court ruled that the district court had properly certified as final its judgment on less than all of the claims in suit under Rule 54(b). The Court clearly held that where the adjudicated claims were not "so inherently inseparable from, or closely related to" the unadjudicated claims the district court could within its discretion conclude that there existed "no just reason for delay" and enter final judgment on the adjudicated claims accordingly. 351 U.S. at 436.

In the companion case of *Cold Metal Process Co.* v. *United Engineering & Foundry Co., supra,* the Court held that its reasoning in *Mackey* was equally applicable to a situation where, as in the present case, a compulsory counterclaim had been interposed. 351 U.S. at 452-53. Neither in *Mackey* nor in *Cold Metal* did the Court even intimate that the district court's discretion to certify under Rule 54(b) was abrogated by the presence of a counterclaim absent "unusual or harsh circumstances."

In the case at bar, the district court concluded that the claims for the contract balances on which it entered final judgment were indeed "separate, distinct, and independent of" any of the other claims in suit, including the counterclaim (App. A at 11a). The court of appeals did not challenge this conclusion. Accordingly, the finding by the court of appeals that the district court abused its discretion is patently incorrect under the prior decisions of the Supreme Court and unduly restricts the discretion given to the district court under Rule 54(b) to enter final judgment on less than all of the claims in suit. (See the dissenting opinion of Judge Gibbons on the petition for rehearing App. C at 49a). The patent conflict between the decision of the court of appeals in this case and the Supreme Court precedents demands the grant of certiorari to review the judgment below.

2. The decision below is in direct conflict with the Tenth Circuit's interpretation of the discretion afforded to the District Court under Rule 54(b).

Relying on the interpretation of Rule 54(b) enunciated in *Allis-Chalmers, supra,* the Third Circuit has, in its opinion below, established what is, in reality, a hard and fast rule that economic loss, no matter how severe, can never constitute a justification for certification. Supplanting its judgment for that of the district court, the Third Circuit herein concluded that neither (1) the loss of over one million dollars per year under modern day interest rates, even for a period of "many months or years" nor, alternatively, (2) the deprivation of nearly $19 million in operating capital for such a period constituted valid reason for Rule 54(b) certification. (The court also completely ignored the impact of an inflationary period and a tight money market which compounds the loss).

The Third Circuit's interpretation of Rule 54(b) stands in stark contrast to the holding of the Tenth Circuit in *United Bank of Pueblo* v. *Hartford Accident & Indemnity Co.,* 529 F.2d 490 (10th Cir. 1976), cited by the district court in support of its decision to certify. There, the Tenth Circuit held that a delay of 10 months in the collection of a judgment in the amount of only $50,000.00 constituted a "financial injustice" in light of present day interest rates that justified the exercise of the district court's discretion under Rule 54(b). The case at bar, where the certified judgment is in the amount of $18,914,408.00, obviously presents a far more flagrant financial injustice resulting from a failure to certify.

This conflict between the circuits reflects a fundamental confusion as to the meaning and application of Rule 54(b). In such circumstances the grant of certiorari to review the judgment below is mandated.

3. The decision below raises significant and recurring problems concerning efforts to invoke Rule 54(b) and promote sound judicial administration and justice to litigants.

The opinion of the Third Circuit in the present case raises important policy considerations concerning the proper application of Rule 54(b). On this issue, the lower courts have not had the benefit of guidance by this Court for 23 years. There are compelling reasons for the Court at this time to provide coherent standards for the review of Rule 54(b) certification. Justice to the litigants, preservation of Rule 54(b) and overall judicial economy demand that the decision below be reviewed by this Court.

It is the basic purpose of Rule 54(b) to avoid the economic loss and denial of justice occasioned by delay in the collection of a judgment. See dissenting opinion of Judge Gibbons on the Petition for Rehearing, App. C. at at 51a. Rule 54(b) provides the mechanism to avert such financial injustice by making an appeal of the adjudicated claim immediately available. *Sears, Roebuck & Co.* v. *Mackey, supra,* 351 at 432. The Third Circuit's decision herein contravenes that basic purpose by severely and unduly limiting the circumstances under which the district court can certify a judgment as final. The Third Circuit has forbidden a district court to certify a claim as a final judgment whenever a counterclaim has been filed unless the Third Circuit's vague and undefined criteria of "harsh or unsual circumstances" has been met. It is incumbent upon the Court in its supervisory role to preserve the integrity of Rule 54(b) and to provide the lower courts and litigants with clear guidance as to the proper application of the Rule.

In holding that any pending counterclaim bars Rule 54(b) certification, the Third Circuit has issued an open invitation to the filing of facially adequate but substantively weak counterclaims. Except in the rare case where summary judgment on the counterclaim is an available alternative, the possibilities for delay and the encouragement of time consuming and costly litigation are the inevitable results of the Third Circuit's position. The courts of appeals should not utilize Rule 54(b) for the convenience of their own calendars at the expense of the authority vested in the district court to determine the proper time and circumstances to enter final judgment on less than all of the claims in suit.

The present case is illustrative of these detrimental, if not absurd, results. Here payment of a liquidated and undisputed debt in the amount of $18,914,408.00 for goods sold, delivered and in use by GE has been delayed by the mere allegation of an unproven and unliquidated counterclaim involving an alleged expenditure by the counterclaimant of less than two million dollars.* Moreover, GE, as

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* The remainder of General Electric's counterclaim is for what can only be called "pie in the sky" damages which would, in essence, give General Electric a windfall profit in excess of $52 million. General Electric claims that by providing Curtiss-Wright with assistance in performance of the 21 contracts, it prevented Curtiss-Wright from incurring additional costs and from suffering a major default on the contracts, thereby saving Curtiss-Wright in excess of $52 million which GE claims it is entitled to recover on the theory that Curtiss-Wright has been "unjustly enriched."

Thus, General Electric takes the ludicrous position that, if Curtiss-Wright had defaulted, it, Curtiss-Wright, would have suffered a net loss in excess of $52 million, but because of General Electric's technical assistance Curtiss-Wright was given the opportunity to invest large amounts of money and effort to complete the contracts while remaining liable to General Electric not only for the alleged value of the assistance, $1,912 million, but also for the same $52 million! See General Electric's answers to Interrogatory Nos. 54, 69 and 74 (App. D). See also Dissenting Opinion of Judge Gibbons on Petition for Rehearing, App. C at 48a.

a cost plus contractor of the United States, has been reimbursed by the government for its expenditures and thus purports to bring its counterclaim on behalf of the government.* As a result of the decision below, the liquidated debt owed by GE to Curtiss-Wright may not be paid for several years with losses to Curtiss-Wright of several millions of dollars at present day interest rates.

Setting aside the injustice of the situation, the Third Circuit has also been unmindful of the adverse impact of its decision on judicial administration. The district court, the court most familiar with the case and responsible for its management, has concluded that the adjudicated claims constituting the balance of the contract price, $18,914,408.00, are ripe for appeal. Clearly, this Court has held that it is the district court which is in the best position to determine when a final judgment should be entered. *Sears, Roebuck & Co.* v. *Mackey, supra*, 351 U.S. at 437.

In addition, the district court is in the best position to determine "that the counterclaim asserted is so much smaller than the liquidated judgment, or so speculative and difficult of proof, that it would be unfair to delay the entry of judgment while the counterclaimant attempts to prove his case. The judge may even conclude that all of part of the counterclaim is being pressed principally to delay payment on the principal obligation and enter judgment under Rule 54(b) in order to encourage a prompt settlement of the remaining claims in controversy." (Dissenting opinion of Judge Gibbons on Petition for Rehearing, App. C at 47a).

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* See General Electric's answers to Interrogatory No. 61(b)(vii) (App. D at 59a).

The Third Circuit's total disregard of the district court's proper function under Rule 54(b) in the disposition of cases under its control demands the grant of certiorari to review the judgment below. In addition, such a review will afford the Supreme Court an opportunity to furnish to lower courts and the bar much needed guidance as to the standards which shall govern Rule 54(b) certification.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Third Circuit.

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[APPENDICES FOLLOW]

APPENDIX A

Opinions and Orders of the United States District Court for the District of New Jersey

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action No. 76-794

CURTISS-WRIGHT CORPORATION,

Plaintiff,

v.

GENERAL ELECTRIC COMPANY,

Defendant.

OPINION

COOLAHAN, Senior District Judge

Plaintiff, Curtiss-Wright Corporation, and defendant, General Electric Company, a prime contractor of the United States Navy, entered into a series of 21 military procurement subcontracts from 1968 to 1972 which called for Curtiss-Wright to produce, for delivery to the United States Navy, various components for use in nuclear submarines and surface vessels. On April 30, 1976, Curtiss-Wright filed a 16-count complaint in this court seeking

damages and reformation with regard to these 21 subcontracts.[1] As permitted by order of this Court on November 18, 1976, plaintiff filed an amendment to and supplemental complaint, (adding counts 17 and 18) seeking, with regard to 12 of these subcontracts, the recovery of the sum of $8,378,536[2] representing the balance allegedly due for goods sold and delivered to defendant over and above the unliquidated damages sought in the original 16 counts of the complaint. It should be noted that there are also counterclaims involved in the instant lawsuit. Jurisdiction over this action exists pursuant to the diversity statute, 28 U.S.C. § 1332.

Curtiss-Wright has moved before this Court for an order granting partial summary judgment as to counts 17 and 18 of the amended complaint. General Electric also has moved for partial summary judgment in its favor as to these counts. The parties agree that the goods involved have already been manufactured and delivered by Curtiss-Wright.

As pointed out above, in the 17th and 18th counts of the amended complaint, plaintiff seeks to recover an $8,378,536 balance allegedly owed on 12 of the subcontracts between the parties. General Electric maintains that its continued withholding of that sum is justified under the

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[1] Plaintiff complains, *inter alia,* of misrepresentations by the defendant during negotiation and execution of the subcontracts and contractual breaches by the defendant during the course of plaintiff's performance.

[2] This figure represents approximately 10% of the aggregate prices set forth in the subcontracts. The remainder has already been paid to Curtiss-Wright by General Electric.

subcontracts involved because a condition precedent to final payment has not been satisfied. The pertinent clause in the subcontracts reads:

> "Seller and each assignee under an assignment in effect at the time of final payment agree as a condition precedent to final payment, that the Buyer and the Government, their respective officers, agents and employees are released from all liabilities, obligations and claims arising under or by virtue of this order. Seller further agrees that the final invoice shall constitute not less than ten percent (10%) of the total order price."

It is the defendant's position that according to this clause, Curtiss-Wright must unqualifiedly release *all* claims against General Electric and the Government relating to the 12 subcontracts in question before it can recover the balance allegedly due under them. Since plaintiff has only offered a qualified release, excepting from the release those very claims it is asserting against defendant in this lawsuit, the defendant maintains that it is entitled to summary judgment on these counts of the complaint because this condition precedent to the right of plaintiff to receive final payment has not been satisfied. The plaintiff, on the other hand, believes that it is entitled to partial summary judgment on these counts, contending that the clause in question should be construed as having no application whatever in this context and thus should not be considered as a bar to plaintiff's right to recover the funds withheld thereunder.

The subcontracts between the parties contain provisions electing New York law as governing "in all respects."

Appendix A

There is no reason why the parties' choice in this regard should not be honored. The pertinent New Jersey choice-of-law principles[3] indicate that the New Jersey courts, if faced with the issues presently before this Court, would honor the New York choice-of-law provisions included in these subcontracts since the applicable New York substantive law does not violate settled public policies of New Jersey and the transaction does bear a reasonable relationship to the State of New York.[4] N.J.S.A. 12A:1-105(1); *Farris Engineering Corporation* v. *Service Bureau Corporation,* 406 F.2d 519, 521 (3d Cir. 1969); *Congress Factors* v. *Malden Mills, Inc.,* 332 F. Supp. 1384, 1390 (D. N.J. 1971).

Plaintiff primarily relies on *Tufano Contracting Corp.* v. *Port of New York Authority,* 33 Misc. 2d 1028, 227 N.Y.S. 2d 707 (Sup. Ct. 1962), *aff'd,* 18 A.D. 2d 832, 237 N.Y.S. 2d 562 (2d Dept. 1963), *aff'd,* 13 N.Y. 2d 967, 244 N.Y.S. 2d 643, 194 N.E. 2d 603 (Ct. App. 1963), in support of its position. In that case, the plaintiff contractor had performed pursuant to a contract with the defendant Port of New York Authority and had thereafter commenced suit against the Authority for the payment of balances allegedly due under the construction contract, for compensation for extra work done thereunder, and for damages due to alleged contractual breaches by the defendant. The parties had included in their agreement a clause similar

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[3] Federal District Court jurisdiction over this case exists because of diversity of citizenship. Thus, New Jersey law must be applied, including New Jersey's choice-of-law rules. *Klaxon Co.* v. *Stentor Electric Mfg. Co.,* 313 U.S. 487 (1941).

[4] Both plaintiff and defendant have also agreed in their briefs that New York law is to govern.

Appendix A

in language and effect to the clause involved in the instant case, and plaintiff similarly was moving for partial summary judgment on its claim for the balances due. The pertinent clause read:

> "The acceptance by the Contractor, or by anyone claiming by or through him, of the Final Payment shall be and shall operate as a release to the Authority of all claims and of all liability to the Contractor for all things done or furnished in connection with this Contract and for every act and neglect of the Authority and others relating to or arising out of this Contract, excepting only his claims for amounts withheld by the Authority as hereinafter provided and for interest upon the Final Payment, if this payment is improperly delayed."

Tufano Contracting Corp., 227 N.Y.S. 2d at 708. In opposition to the motion, defendant argued:

> ". . . Judgment for plaintiff on its first cause of action could be given at this time only by ignoring the plain provisions of the contract in suit to the effect that acceptance by plaintiff of a final payment operates as a release to the Port Authority."

Tufano Contracting Corp., 227 N.Y.S. 2d at 708. This is substantially the same argument being made by General Electric in opposition to Curtiss-Wright's partial summary judgment motion and in support of its own motion for partial summary judgment.

The trial court in *Tufano* pointed out quite correctly that the release clause was valid and would be enforced if a contractor accepted final payment and thereafter at-

tempted to assert claims under the same contracts. 227 N.Y.S. 2d at 708. *See also Brandt Corp.* v. *City of New York,* 14 N.Y. 2d 217, 250 N.Y.S. 2d 407, 199 N.E. 2d 493 (1964); *Buffalo Elec. Co.* v. *State,* 14 N.Y. 2d 453, 253 N.Y.S. 2d 537, 201 N.E. 2d 869 (1964). However, in *Tufano,* the contractor did not accept final payment, but instead filed suit asserting claims both for the final payments and for other contractual relief. The trial court stated that in so doing the "plaintiff did not contract away its right to sue for sums which it had earned," 227 N.Y.S. 2d at 708, and ultimately ruled:

> "... the release clause nowhere prescribes the time when judgment may be entered after such action is brought. Nor does the court consider judgment on the first cause of action to be final payment under the release clause of the contract."

227 N.Y.S. 2d at 708-709. Thus the court was of the opinion that summary judgment on the claim for the balances due did not constitute acceptance of "final payment" for purposes of the contractual provision that acceptance of final payment would operate as a release to the defendant.

The Supreme Court's decision in *Tufano* was affirmed by the Appellate Division and by the New York Court of Appeals. The Appellate Division agreed that plaintiff's acceptance of payment pursuant to the partial summary judgment ruling should not be deemed the equivalent of voluntary acceptance of final payment under the clause in question and thus would not result in the release of its other claims arising out of the contract. The Court of Appeals affirmed without opinion.

The pertinent contractual provision in the present case is strikingly similar to that involved in *Tufano.* It likewise provides that acceptance of final payment by Curtiss-Wright should operate to release General Electric and the Government from "all liabilities, obligations and claims arising under" the various contracts between the parties. According to *Tufano,* the contracts in question do not prescribe the time when judgment may be entered on a claim for the amount withheld after an action such as the present one has been instituted. 227 N.Y.S. 2d at 708-709. Thus the contractual clauses in question are not expressly applicable in the context of the instant motions for partial summary judgment. Therefore, payment to Curtiss-Wright of the balances due pursuant to an order of the Court would not constitute "final payment" as to result in a release of General Electric and the Government from "all liabilities, obligations and claims arising under" the contracts between Curtiss-Wright and General Electric.

The defendant has claimed that *Tufano* is not apposite and that instead *R.J. Marshall, Inc.* v. *Turner Construction Co.,* 139 N.Y.S. 2d 55 (Sup. Ct. 1955), represents the controlling authority under New York case law. In *R.J. Marshall,* a subcontractor had moved for partial summary judgment upon its first cause of action against a contractor for the alleged balance owing under a written contract. The contract in question specifically provided:

> "... Prior to final payment, the subcontractor shall execute and deliver to Turner (the contractor), a General Release in a form satisfactory to Turner, holding Turner and the Owner free and harmless from all claims arising out of, or in connection with, this contract."

139 N.Y.S. 2d at 57. The defendant, in opposition to the summary judgment motion, had alleged that a condition

precedent to paintiff's right to final payment had not been complied with, that being the execution by plaintiff to defendant of a general release as called for by the contract. The court ruled that plaintiff's contention that the condition precedent had been waived by defendant presented a question not properly the subject of summary disposition. The court also held that such a clause could preclude partial summary judgment and would be so enforced.

R.J. Marshall is distinguishable from both *Tufano Contracting Corp.* and the case *sub judice.* In *R.J. Marshall* the parties had expressly provided for the performance of a specific act before the right to final payment was to accrue. In the present case and in *Tufano,* the fact of final payment was fashioned by the contracts to operate as the release. The contracts between Curtiss-Wright and General Electric state that the parties "agree as a condition precedent for final payment, that the Buyer and the Government . . . are released." The fact of final payment was to result in a release of General Electric and the Government, the release being the condition attached to final payment. The pertinent clause in *Tufano* was similar in this respect. The contractual provision in *R.J. Marshall,* however, in requiring a written release before final payment was to become due, might be considered applicable in the context of partial summary judgment. In any event, the relevant contractual provision in the instant case is closer in language and effect to that involved in *Tufano* and thus should also not be considered applicable to the issues presently before this Court. *Tufano Contracting Corp.,* 227 N.Y.S. 2d at 708-709.

Alternatively, to the extent that *R.J. Marshall* may be deemed apposite, that is, to the extent that the contract presently before this Court more closely resembles that in-

volved in *R.J. Marshall* that that in *Tufano,* this Court must now consider *R.J. Marshall* to have been repudiated by the subsequent decisions of the New York courts in *Tufano.*[5] *Tufano's* definition of "final payment" as not including an award by a court pursuant to an application for partial summary judgment must be regarded as also applicable in the *R.J. Marshall* situation as well. The *Tufano* case is the more recent of the two cases and was affirmed with opinion by the Appellate Division and affirmed without opinion by the New York Court of Appeals. Since New York law is to govern,[6] *Tufano* must be considered as the controlling authority in New York on the issues immediatetly before this Court.

For the foregoing reasons, the defendant is not justified in withholding final payment from the plaintiff at this time because of the "final payment" clause in the subcontracts between the parties. Furthermore, any acceptance by Curtiss-Wright of payment from General Electric pursuant to this Court's ruling will not operate to release General Electric and the Government from the other claims of plaintiff Curtiss-Wright which are presently the subject of this lawsuit. The parties in this action agree, and the New York case law is in accord, that the issue of interest due on any moneys withheld is not properly before the Court at this time. Therefore, the Court will not make any ruling on that issue. The parties are instructed to submit an appropriate order.

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[5] The New York courts in *Tufano* did not refer to the opinion in *R.J. Marshall, Inc.* v. *Turner Construction Company.*

[6] See pp. 3-4, *supra.*

Appendix A

LETTER OPINION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
NEWARK, N. J. 07102

CHAMBERS OF
JAMES A. COOLAHAN
SR. JUDGE

July 27, 1978

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Gentlemen:

Curtiss-Wright Corp. v. General Electric Co.
Civil Action No. 76-794

Plaintiff, Curtiss-Wright Corporation, has moved for Rule 54(b) certification of this Court's orders of February 24, 1978, and July 27, 1978, which granted to plaintiff summary judgment and prejudgment interest upon counts 17 and 18 of the Amendment to and Supplemental

Appendix A

Complaint. Plaintiff's prior motion for Rule 54(b) certification of the order of February 24, 1978, alone was denied by Letter Opinion of February 24, 1978, because at that time the matter of prejudgment interest had not yet been resolved. *See Cinerama, Inc.* v. *Sweet Music, S.A.*, 482 F.2d 66 (2d Cir. 1973).

It is clear that Rule 54(b) certification is not to be granted as a matter of course and that this remedy should be reserved for the infrequent harsh case because of the overload which would otherwise result in the federal appellate courts. Furthermore, it is also well established that the considerations which are involved in a grant of summary judgment are not the same considerations relevant to an order of final certification under Rule 54(b). The essential inquiry is whether, after balancing the competing factors, finality of judgment should be ordered to advance the interests of sound judicial administration and justice to the litigants. *Allis-Chalmers Corp.* v. *Philadelphia Electric Co.*, 521 F.2d 360 (3d Cir. 1975)

In the instant case, certification of the above orders could not, in any way, result in unnecessary appellate review. The claims which have been finally adjudicated are separate, distinct, and independent of any of the other claims or counterclaims involved in this lawsuit. Plaintiff's other claims generally seek recovery for alleged cost overruns and lost profits, and defendant's counterclaims generally seek to recover for the costs of alleged technical assistance provided by the defendant to the plaintiff. For this reason, certification should not prevent the rest of this case from being prepared for trial. Also, because of the above, the need for review will not be mooted by any future developments in the District

Court. The determinations by the District Court regarding the claims sought to be certified under Rule 54(b) are final and will not be changed by later developments in the District Court. Furthermore, because of the nature of the claims which are involved, the appellate courts will not need to decide the same issues more than once even if two appeals arise out of this case.

Justice to the litigants will also be advanced by certifying the above orders. Plaintiff has sustained, and will continue to sustain, losses due to delay in payment of the sums which are owed. Plaintiff will only be entitled to prejudgment simple interest at the rate of six percent per annum pursuant to this Court's order of July 27, 1978, and, because of modern interest rates, will suffer daily financial losses from nonpayment of these liquidated debts. *United Bank of Pueblo* v. *Hartford Accident & Indemnity Co.*, 529 F.2d 490 (10th Cir. 1976). Since several millions of dollars are owed by the defendant, great injustice would result from further delay. In fact, because of the complex nature of the remaining claims in this case, the delay in payment which would occur if certification is denied would span many months, if not years.

The solvency of the parties is not a factor weighing heavily either against or in favor of Rule 54(b) certification under the circumstances of this case. Both the plaintiff and the defendant appear to be financially sound. Therefore, plaintiff's financial condition is such that it would be able to await the payment of these sums, and defendant's economic status is such that defendant will be able to satisfy the judgment whenever final judgment is entered. However, it is likewise true that defendant

is able to pay now without awaiting the adjudication of its counterclaims for use as a possible setoff, and that plaintiff will be able to satisfy a judgment in favor of defendant on the counterclaims whenever such judgment is entered.

Although the presence of defendant's counterclaims and the consequent possibility of a setoff recovery are factors weighing against certification, the Court is of the opinion that such is outweighed in this case by considerations favoring Rule 54(b) certification. After balancing all of the factors as outlined above, it appears that there is no just reason for delay and that final judgment should be entered under Rule 54(b) encompassing the orders of February 24, 1978, and July 27, 1978. Accordingly, on this date, I have signed an order to this effect.

JAMES A. COOLAHAN
U.S. Senior District Judge

Original filed with Clerk of the Court

Appendix A

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action No. 76-794

CURTISS-WRIGHT CORPORATION

Plaintiff,

v.

GENERAL ELECTRIC COMPANY,

Defendant.

ORDER

This matter having been opened to the Court upon the motion of plaintiff, Curtiss-Wright Corporation, for an order granting Rule 54(b) certification of this Court's orders of February 24, 1978, and July 27, 1978, which awarded to plaintiff summary judgment and prejudgment interest upon counts 17 and 18 of the Amendment to and Supplemental Complaint, and the Court having considered the moving papers and briefs submitted by the parties, and good and sufficient cause having been shown, for reasons set forth in this Court's letter opinion filed this day,

It is, on this 27th day of July, 1978, ORDERED that final judgment be entered under Rule 54(b) encompassing the orders of February 24, 1978, and July 27, 1978, there being no just reason for delay.

JAMES A. COOLAHAN
U.S. District Judge

Appendix A

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action

No. 76-794

CURTISS-WRIGHT CORPORATION,

Plaintiff,

—VS.—

GENERAL ELECTRIC COMPANY,

Defendant.

ORDER

This matter having been opened to the Court upon the motion of plaintiff, Curtiss-Wright Corporation, for an Order granting Rule 54(b) certification of this Court's Order of August 29, 1978, which awarded to plaintiff summary judgment and prejudgment interest upon Count 19 of the Additional Supplemental Complaint, and good and sufficient cause having been shown, for the reasons set forth in this Court's letter opinion filed July 27, 1978,

It is on this 29 day of August, 1978,

ORDERED, that final judgment be entered under Rule 54(b) encompassing the above referenced Order of August 29, 1978, there being no just reason for delay.

JAMES A. COOLAHAN, U.S.D.J.

Appendix A

Consented to as to Form:

CRUMMY, DEL DEO, DOLAN & PURCELL
Attorneys for Plaintiff, Curtiss-Wright Corporation
By: RALPH N. DEL DEO

HANNOCH, WEISMAN, STERN & BESSER
Attorneys for Defendant, General Electric Company
By: ALBERT G. BESSER

COLE AND GRONER, P.C.
Attorneys for Defendant, General Electric Company
By: ISAAC N. GRONER

APPENDIX B

Opinion, Orders and Judgment of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS

FOR THE THIRD CICRUIT

Nos. 78-2179 and 78-2293

CURTISS-WRIGHT CORPORATION,

v.

GENERAL ELECTRIC COMPANY,
Appellant.

(D.C. Civil No. 76-0794)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Argued March 22, 1979

Before SEITZ, *Chief Judge,* ALDISERT and ROSENN,
Circuit Judges.

(Opinion filed April 17, 1979)

Appendix B

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(argued)
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Appendix B

OPINION OF THE COURT

PER CURIAM.

In a diversity action by Curtiss-Wright Corp. (Curtiss) against General Electric Company (GE), the district court granted summary judgment to Curtiss on its claims for outstanding balances due on contracts with GE; additional claims arising out of the contractual relationship have not yet been adjudicated. The district court certified that the judgments were final under Rule 54(b) of the Federal Rules of Civil Procedure.

GE appealed the 54(b) judgments. It first contends that the entry of the 54(b) certifications was not consistent with a sound exercise of discretion, and thus requests this court to dismiss the appeals without consideration of the merits.

Curtiss, as subcontractor, entered into 21 subcontracts with GE, prime contractor for the Navy, to build component parts for propulsion systems on nuclear vessels for about $215 million. Most of the claims asserted by Curtiss were based on alleged fraud and misrepresentation by GE which caused cost overruns and prevented Curtiss from making a profit. Three of Curtiss's claims sought payment from GE on the outstanding balances due on the 21 subcontracts. GE counterclaimed for $60 million in costs incurred by it due to Curtiss's alleged failure to perform its contractual obligations competently.

The district court granted summary judgment on the claims for the amount of the outstanding balances and directed GE to pay Curtiss $19 million along with prejudgment interest. It further directed that such judgments were final under Rule 54(b) and stated its reasons for such action.

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GE asserts that the entry of the 54(b) certifications under the circumstances of this case was in direct conflict with the rules announced by this court in *Allis-Chalmers Corp.* v. *Philadelphia Electric Co.*, 521 F.2d 360 (3d Cir. 1975). We address that contention.

In *Allis-Chalmers* this court stressed that certification should be the exception rather than the rule, and delineated illustrative factors governing the trial court's discretion in certifying a judgment as final under 54(b). 521 F.2d at 364. We went on to state:

> In the absence of unusual or harsh circumstances,[14] we believe that the presence of a counterclaim, which could result in a set-off against any amounts due and owing to the plaintiff, weighs heavily against the grant of 54(b) certification.

Id. 366. Footnote 14 to the quoted sentence defined unusual or harsh circumstances as those factors "involving considerations of solvency, economic duress, etc."

The district court addressed the general requirements of *Allis-Chalmers* as they applied to this case, stating that the certification would not result in duplicative appellate review because the claims for final payment were totally distinct from the other issues in the case. It felt for the same reasons that the proceedings in the district court could continue pending the appeal and would not moot any determination of the merits of this appeal. The district court also felt that justice in this litigation would be served by certification because Curtiss would suffer daily financial losses from its inability to achieve a greater return on the $19 million judgment than the 6% interest authorized by New York law. The court also concluded that GE could

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afford to pay and that Curtiss would be able to repay the funds if GE succeeded on its counterclaims.

[We turn to an examination of the reasons given by the district court for certifying these judgments. The first reason given was that certification would not result in a duplication of issues to be resolved after final judgment on all the claims. While this may be so, it is also entirely possible that there will be no need to decide the merits of this appeal if an appeal is taken from the final determination of all claims and counterclaims in this case. We say this because GE represents that the single issue it raises on the merits here will not be raised after final judgment.]*

The practical consideration here is that the court is being asked to say who should have the benefit of the money until the litigation is finally resolved. We think that *Allis-Chalmers* dictates that the matter remain in status quo when non-frivolous counterclaims are pending, and in the absence of unusual or harsh circumstances.

Finally, and of decisive significance, it is tacitly conceded that the only harsh circumstance presented here is Curtiss's inability to use the money from the judgment. The result is indeed harsh from Curtiss's viewpoint, but what if GE prevails on its compulsory counterclaim? How is its loss resulting from the deprivation of the money to be restored? In any event this factor was rejected as controlling in *Allis-Chalmers*. Indeed, this was the primary basis for the dissent in *Allis-Chalmers*. *See* 521 F.2d at 367 (Gibbons, J., dissenting). As a three judge panel, we

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* Portions in [] were subsequently modified by orders of the Court. See App. B at 32a, 33a.

are bound to apply *Allis-Chalmers* here. *See* Third Circuit Internal Operating Procedures, Chapt. VIII, C.

The appeal will be dismissed for want of an appealable order with a direction to the district court to vacate so much of its judgment as purported to render a final judgment pursuant to Rule 54(b). Each party shall bear their own costs.

ROSENN, *Circuit Judge,* Dissenting

I respectfully dissent because I believe that the district court's certification of this appeal under Rule 54(b), Fed. R. Civ. P., was not an abuse of discretion.

Curtiss-Wright Corporation ("Curtiss-Wright") entered into twenty-one subcontracts to deliver components to General Electric Company ("GE"), a prime contractor for the United States, for eventual use in the construction of nuclear naval vessels. In connection with these contracts, Curtiss-Wright brought a suit against GE in which Curtiss-Wright sought damages and reformation of the subcontracts, alleging fraud, misrepresentation, and contractual breaches by the defendant. GE then withheld the final payments to Curtiss-Wright for the material manufactured and supplied by Curtiss-Wright, and GE interposed counterclaims alleging that Curtiss-Wright had failed to perform competently, and that as a consequence GE was required to render it extraordinary assistance. Curtiss-Wright then added to its complaint three counts seeking the final payments that GE had held back.

Although it is conceded that Curtiss-Wright had manufactured and delivered to GE the components for which the

final payments were claimed, and GE did not object to the quality of the parts, GE refused to make the payments.[1] In this refusal, GE relied on a contractual provision which, as GE interposed it, conditioned the final payments on Curtiss-Wright's release of all claims against GE. Because Curtiss-Wright was suing GE for fraud, misrepresentation, and contractual breaches, it would not assent to any such release. Applying the law of New York in this diversity suit, the district court ruled that, notwithstanding the contractual provision on which GE rested its argument, Curtiss-Wright was entitled to judgment on its claims for the final payments. The partial summary judgment won by Curtiss-Wright amounted to nearly 19 million dollars. The district court then certified its judgment for immediate appeal, while retaining jurisdiction over Curtiss-Wright's other claims and GE's counterclaims.

In *Allis-Chalmers Corp.* v. *Philadelphia Electric Co.,* 521 F.2d 360 (3d Cir. 1975), this court set out several considerations that a district court should take into account when it rules upon a motion for certification under Rule 54(b). Unless, in weighing these factors, the district court has abused its broad discretion, we may not disturb its decision in favor of certification. *Id.* at 367 n.16. *See Sears Roebuck & Co.* v. *Mackey,* 351 U.S. 427, 437 (1956). The Rule "defines finality in terms of what the district

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[1] It is undisputed that as of September 23, 1976, Curtiss-Wright had made and General Electric had accepted delivery of all of the large components called for by twelve of the twenty-one subcontracts which formed the basis for the district court's partial summary judgment. By August 28, 1978, GE had accepted delivery of the parts manufactured by Curtiss-Wright under the remaining nine subcontracts.

court does and gives this court broad discretion in applying finality." 6 Moore's Fed. Practice ¶ 54.28[1].[2]

In my judgment, the trial judge identified two considerations of sufficient gravity to justify his exercise of discretion. First, Judge Coolahan noted an economic consideration favoring immediate appeal. *See Allis-Chalmers Corp.* v. *Philadelphia Electric Co., supra* 521 F.2d at 364. He concluded that Curtiss-Wright, under New York law, can recover prejudgment interest of only six percent. The interest on the award already granted by the district court will continue in the face of the high cost of money to accrue at this comparatively low rate until Curtiss-Wright can execute on its judgment. If this court were to hear the appeal certified by the district court and to sustain the district court's judgment, Curtiss-Wright could execute immediately. Because of the disparity between six percent simple interest and the much higher interest rates now prevalent in the marketplace, Curtiss-Wright will lose (as GE conceded at oral argument) over a million dollars per

[2] Because federal rules provide extensively for the presentation of numerous claims that are often diverse, unrelated, and involve multiple parties, "it was highly desirable that the district court be given broad powers to enter separate judgments. . . ." 6 Moore's Fed. Practice ¶ 54.22. The Rule gives the trial judge the necessary elasticity because he has firsthand information as to the litigation, its progress, and the timeliness for a separate judgment and appellate review. He is in "an excellent position to determine from the standpoint of justice to the litigants the best time at which to terminate by final judgment of the litigation with respect to a single claim in the multiple claims suit and thus to open the way to immediate appellate review and execution of judgment." Bendix Aviation Corp. v. Glass, 195 F.2d 267, 272 (3d Cir. 1951) (Maris, J.).

year until this litigation can be finally consummated. This could conceivably take years to complete.[3]

The Tenth Circuit accepted a similar argument in *United Bank of Pueblo* v. *Hartford Accident & Indemnity Co.,* 529 F.2d 490 (10th Cir. 1976). The court considered a delay as brief as ten months in collecting a judgment, although very much smaller than the one *sub judice,* to constitute "a financial injustice" in the face of a high interest rate in the market. *Id* at 493. Judge Coolahan cited that case in support of his certification.

The prediction about Curtiss-Wright's losses assumes that if Curtiss-Wright's judgment were satisfied now, the company, by outside investment of the proceeds, could secure a rate of return approximating the interest available in the market. But Curtiss-Wright might have, as it indicated at oral argument, a more efficient use for the money if it devoted the 19 million dollars to its own operations. Even for a large corporation, such as Curtiss-Wright, a block of capital as great as this can play a significant part in the operations of the economy.

This is not to say the district court should certify every money judgment carrying prejudgment interest of less than the market rate. Such a conclusion would conflict with *Allis-Chalmers,* which suggested that a district court ascertain whether the action before it is "the infrequent harsh case" warranting certification. But when the judgment is for a very large sum of money, and the current

[3] The district court also noted that "because of the complex nature of the remaining claims in this case, the delay in payment which would occur if certification is denied would span many months, if not years." He concluded that "great injustice would result from further delay."

cost of money is exceptionally high, the substantial loss to the creditor caused by further delay must be weighed by the court. In assessing economic considerations, a district court should weigh the size of the judgment, the degree of disparity between market interest and prejudgment interest, and the importance of the award for the prevailing party, as well as the other considerations recognized by *Allis-Chalmers*.[4] In this case, the district court touched all of these bases.

In putting aside the district court's careful considerations, the majority stresses the existence of GE's counterclaims. It relies on the passage in *Allis-Chalmers* that the presence of a counterclaim, in the absence of unusual or harsh circumstances, "weighs heavily against the grant of 54(b) certification." 521 F.2d at 366. But note 14 of that opinion suggested, without limitation, that "unusual or harsh circumstances" referred to "considerations of solvency, economic duress, etc." In the present case, the majority notes that GE's counterclaims are not frivolous, and it argues that the district court identified no "unusual or harsh circumstances" justifying certification. The disparity of interest rates, it urges, cannot constitute "unusual or harsh circumstances" because "this factor was rejected as controlling in *Allis-Chalmers*." By this statement the majority evidently means that, despite the presence of losses due to interest rates, *Allis-Chalmers* allowed the posibility that certification there might have been improper. I disagree with the majority's analysis about the effect of GE's counterclaims.

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[4] Even if *Allis-Chalmers* did not develop the contours of the meaning of "economic considerations," 521 F.2d at 364, that opinion observed that it did not exhaust the catalog of factors. 521 F.2d at 364 n.6.

Allis-Chalmers did not hold that the deprivation of the use of money would never constitute "unusual or harsh circumstances" outweighing the existence of counterclaims. Indeed, the majority in *Allis-Chalmers* never even reached the *merits* of the district court's certification; it focused only on the mischief of unbridled certifications and the necessity for a statement of reasons by the district court when it grants a 54(b) certification:

> Notwithstanding the stridency of the dissent, our holding is not that this was an improper case for Rule 54(b) certification. We have remanded *only* for a *statement of reasons* so that this court may properly determine if this was "the infrequent harsh case" warranting final certification. . . .
>
> We express no opinion on the dissent's analysis of the factors to be considered by the district court because, in the view we take, that is a proper function for the district court. Our consideration of such factors is only to determine whether the district court abused its discretion in granting final certification.

Allis-Chalmers Corp. v. *Philadelphia Electric Co., supra* 521 F.2d at 367 n.16 (original emphasis).

Nothing in *Allis-Chalmers* forecloses the conclusion that it would be unreasonable—even harsh—to prevent Curtiss-Wright's use of the proceeds from a 19 million dollar judgment. The district court properly examined the size and importance of Curtiss-Wright's prospective losses. In this connection, one should not minimize the effect, even upon a large corporation, of a deprivation of the use of almost 19 million dollars in operating capital since Septem-

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ber 1976, especially during an inflationary period and in a tight money market.

It is true, as the majority contends, that GE may ultimately prevail on its counterclaims and that, in this event, GE and not Curtiss-Wright would have suffered the deprivation of 19 million dollars during the interim. It is also true, however, that GE may fail in its counterclaims, so that the disadvantage would be placed on Curtiss-Wright. Unlike the majority, I do not read *Allis-Chalmers* to dictate "that the matter remain in status quo when non-frivolous counterclaims are pending." Rule 54 gives the district court discretion, it seems to me, to consider the size of the loss due to a disparity in interest rates, the indefinite deprivation of substantial working capital advanced in behalf of GE, and the consequent importance for the litigants.

In the context of Rule 54(b), which contemplates that delay in reviewing partial judgments may be harmful and oppressive, our standard of review is limited to ascertaining whether the district court abused its discretion when it certified "there is no just reason for delay" and directed the entry of final judgment upon three of the claims aggregating approximately 19 million dollars. This court may not and should not substitute its judgment for that of the district court. *Allis-Chalmers* only directs the district court to articulate its reasons when it directs the entry of a final judgment on fewer than all the claims. Our review function on the certification should be merely an inquiry as to whether the justification proffered has a reasonable basis.

In any event, the passage from *Allis-Chalmers* concerning counterclaims does not designate the existence of a

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counterclaim as absolutely decisive, even in the absence of harsh circumstances. Otherwise, the assertion of any counterclaim, even one contrived, would defeat the possibility of certifying an appeal under Rule 54(b), a situation hardly contemplated by the authors of the Rule. [*Allis-Chalmers* only prescribed that the district court weigh a counterclaim "heavily." There is in the present case, however, a second factor that both establishes the harshness of circumstances here and has an independent significance to be balanced against the counterclaims.

Although the district court stated unequivocally that the issues to be reviewed in a certified appeal would not duplicate any of the issues raised by the remaining claims and noted that certification would not entail unnecessary appellate review[5] the majority asserts that if this appeal

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[5] Judge Coolahan concluded that certification would not in any way result in unnecessary appellate review.

> The claims which have been finally adjudicated are separate, distinct, and independent of any of the other claims or counterclaims involved in this lawsuit. Plaintiff's other claims generally seek recovery for alleged cost overruns and lost profits, and defendant's counterclaim generally seek to recover for the costs of alleged technical assistance provided by the defendant to the plaintiff. For this reason, certification should not prevent the rest of this case from being prepared for trial. Also, because of the above, the need for review will not be mooted by any future developments in the District Court. The determinations by the District Court regarding the claims sought to be certified under Rule 54(b) are final and will not be changed by later developments in the District Court. Furthermore, because of the nature of the claims which are involved, the appellate courts will not need to decide the same issues more than once even if two appeals arise out of this case.

is dismissed, the issues now presented may no longer exist in an appeal from a later judgment on the whole case. The basis for this possibility lies in the nature of Curtiss-Wright's contract claims for the final payments. GE is resisting the claims on the sole ground that Curtiss-Wright still has other claims outstanding against it. When Curtiss-Wright has litigated all of these other claims, GE will acknowledge the 19 million dollar debt it owes Curtiss-Wright.

But suppose, as the district court concluded, that New York law rejects GE's interpretation of the contractual provision on which GE relies in resisting payment. Waiting for this contract issue to disappear in a later appeal would be effectively to enforce GE's incorrect view of New York law. GE contends that, by virtue of its contract as interpreted under the law of New York, the company may delay its final payments until all other claims against it have been resolved. Because the court dismisses this appeal as improperly certified, this contract issue will indeed vanish. But the reason will be that, even though the law of New York rejects GE's asserted right to delay payment, GE will have achieved fully by our preclusion of the appeal what it sought through its argument on the merits.[6]

I do not mean to suggest that this result would violate the rule of *Erie Railroad Co.* v. *Tompkins,* 304 U.S. 64 (1938), which requires federal courts, sitting in diversity, to apply state substantive law. I do mean to say that the danger of an oblique victory for GE's contract defense,

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[6] Although under *Allis-Chalmers,* the possibility that a claim may be mooted counts against certification, *Allis-Chalmers* refers to a dif-

(Footnote continued on following page)

accomplished by the preclusion of this appeal, bears on whether the district court abused its discretion in certifying the judgment under Rule 54(b).]

Being persuaded that the district court did not abuse its discretion, I would reach the merits of the contract issue. For the reasons so well expressed in the district court's opinion, I would sustain the summary judgment in favor of Curtiss-Wright.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(Footnote continued from preceding page)

ferent sense of mootness from that involved here. *See* Allis-Chalmers Corp. v. Philadelphia Electric Co., *supra* 521 F.2d at 364 & n.8. On the issue of mootness *Allis-Chalmers* cited Panichella v. Pennsylvania R.R. Co., 252 F.2d 452, 455 (3d Cir. 1958), in which the district court certified a claim asserted by the defendant against a third party. As the court, in *Panichella* wrote, "the third-party claim is so completely incidental to and dependent upon the principal claim that there can be no recovery upon the third-party claim unless the plaintiff shall prevail on the principal claim." *Id.* If, in *Panichello,* the third-party claim became moot, the parties litigating the claim would have lost nothing by the delay in review, and judicial resources would be conserved. Decision on the mooted claim could truly be avoided. Here, by contrast, the delay in review hurts Curtiss-Wright, because the basis of mootness will be that GE, through the delay, will have already gained the very point it seeks in its substantive argument. This court, in effect, will not avoid decision on the mooted claim; it will have effectively decided the claim in favor of GE.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 78-2179 and 78-2293

CURTISS-WRIGHT CORPORATION,

v.

GENERAL ELECTRIC COMPANY,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present: SEITZ, *Chief Judge,* ALDISERT and ROSENN, *Circuit Judges*

ORDER AMENDING OPINION

It is ORDERED that the first full paragraph on page 4 of the printed slip opinion in the above captioned matter, filed on April 17, 1979, be and hereby is deleted.

BY THE COURT,

SEITZ
Chief Judge

DATED: May 11, 1979

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 78-2179
78-2293

CURTISS-WRIGHT CORPORATION,

v.

GENERAL ELECTRIC COMPANY,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

D.C. Civil No. 76-0794

Before SEITZ, *Chief Judge*, ALDISERT and ROSENN, *Circuit Judges*

ORDER AMENDING DISSENTING OPINION

The dissenting opinion in the above-entitled matter, filed April 17, 1979, is amended as follows:

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1. The text is deleted from line 23 at page 10 of the slip opinion, beginning with the words "*Allis Chalmers* only prescribed," through the end of line 8 on page 12, which concludes with the words "judgment under Rule 54(b)", including footnote 6.

2. The following paragraph is substituted in place of the deleted text:

> There is in the present case, however, a second factor that both establishes the harshness of circumstances here and has an independent significance to be balanced against the counterclaims. The district court stated unequivocally that the issues to be reviewed in a certified appeal would not duplicate any of the issues raised by the remaining claims and noted that certification would not entail unnecessary appellate review.[5]

3. Footnote 5 is retained as it is in the original slip opinion.

MAX ROSENN
Circuit Judge

Dated: May 21, 1979

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
Nos. 78-2179 and 78-2293

CURTISS-WRIGHT CORPORATION,

v.

GENERAL ELECTRIC COMPANY,

Appellant.

(D.C. Civil No. 76-0794)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Present: SEITZ, *Chief Judge* and ALDISERT and ROSENN, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on March 22, 1979.

On consideration whereof, it is now here ordered and adjudged by this Court that the above entitled appeals be, and the same are hereby dismissed for want of an ap-

Appendix B

pealable order and the cause remanded with a direction to the said District Court to vacate so much of its judgment as purported to render a final judgment pursuant to Rule 54(b), all in accordance with the opinion of this Court. Each party to bear its own costs.

Attest:

THOMAS F. QUINN
Clerk

April 17, 1979

Certified as a true copy and issued in lieu of a formal mandate on June 12, 1979.

TEST:

THOMAS F. QUINN
Clerk, United States Court of Appeals for the Third Circuit

APPENDIX C

Opinion of the United States Court of Appeals for the Third Circuit on Plaintiff's Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 78-2179 & 78-2293

CURTISS-WRIGHT CORPORATION,

v.

GENERAL ELECTRIC COMPANY,
Appellant.

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, and ALDISERT, ADAMS, GIBBONS, ROSENN, WEIS and HIGGINBOTHAM, *Circuit Judges.**

The petition for rehearing filed by Appellee in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular

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* Judges Hunter and Garth did not participate in the consideration of this matter.

Appendix C

active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

For the reasons pointed out by Judges Rosenn and Gibbons, Judges Adams and Higginbotham believe that the issues raised in this appeal are of sufficient importance so as to command the attention of the full Court. Accordingly, they vote for rehearing.

By The Court

Aldisert
Judge

Dated: June 4, 1979

Appendix C

UNITED STATES COURT OF APPEALS

For the Third Circuit

Nos. 78-2179 and 78-2293

CURTISS-WRIGHT CORPORATION,

v.

GENERAL ELECTRIC COMPANY,
Appellant.

(D.C. Civil No. 76-0794)

Dissenting Opinion Sur Denial of
Petition for Rehearing

(Filed—June 4, 1979)

Gibbons, *Circuit Judge,* dissenting:

I dissent. In a casual *per curiam* opinion[1] the panel majority, without analysis or explanation, has established a virtual *per se* barrier to Rule 54(b) certification in civil damage actions involving counterclaims. With similar un-

[1] Internal Operating Procedure V.B.1. specifies that *per curiam* opinions are to be reserved for "those cases where the law is relatively clear and does not necessitate a signed opinion." With deference, I suggest that Judge Rosenn's opinion persuasively demonstrates that this is not a proper case for a *per curiam* disposition.

illumination the panel majority also adopts the rule that financial hardship should never be a justification for Rule 54(b) certification unless the claimant is insolvent. These extraordinary holdings find no support in the prior law of this circuit and run directly counter to the spirit and purpose of Rule 54(b). If applied literally and consistently, they will sharply limit the effective use of Rule 54(b) in this circuit, with resulting harm both to litigants and to the ability of district judges to expedite the disposition of cases. This threat to the integrity of the Rule 54(b) certification process is worthy of the court's *en banc* attention.[2]

I. The Facts

This suit is a paradigmatic example of a complex commercial litigation. It grows out of the performance, over a period of nearly a decade, of 21 subcontracts for the production of nuclear propulsion components. These subcontracts had a total value of $215 million. Curtiss-Wright's initial complaint pleaded 16 counts of fraud, misrepresentation, and breach of contract on the part of General Electric in the performance of various subcontracts. Three counts later added by an amended complaint sought $19 million in contract price balances owed under the 21 subcontracts. The latter claims are the subject of this appeal.

General Electric's counterclaim is in two parts. Counts I-IV of the counterclaim constitute a single attempt to

[2] This dissent necessarily retraces some of the ground covered in Judge Rosenn's thoughtful dissent from the panel opinion, with which I fully agree. I write separately only to stress certain features of this case which make it a particularly worthy subject for *en banc* reconsideration.

recover, on different theories, for $1.9 million in costs incurred as the result of "extraordinary efforts" in the nature of technical assistance provided to Curtiss-Wright during the performance of the 21 contracts in suit. Count V sweeps more broadly. In it, General Electric claims that the same "extraordinary efforts" for which it seeks to recover in Counts I-IV of the counterclaim enabled Curtiss-Wright to avoid a contract default and a consequent loss of $52 million. General Electric asserts a claim to that $52 million on the theory that Curtiss-Wright has been unjustly enriched by what it never gained, but did not lose.

The facts underlying most of the claims in this extraordinarily large and complex commercial dispute are hotly disputed. Reviewing the case, the district court concluded that full resolution of all of the issues in the case would require "many months, if not years." Certainly this court is in no position to contest that conclusion. Curtiss-Wright's $19 million claim on the subcontracts, however, is not subject to factual dispute. General Electric has accepted the Curtiss-Wright components, has found no fault with them, and has used them in the performance of its prime contract with the Navy. Its sole defense to the claims to payment on the subcontracts is Article 5(c), a provision in each agreement which requires that as a condition to final payment Curtiss-Wright must release all claims arising out of the performance of that agreement. General Electric contends that so long as Curtiss-Wright's 16 claims remain pending Article 5(c) constitutes a bar to recovery of the undisputed contract balances. The application and interpretation of Article 5(c) to the 16 claims presents a pure question of law which the district court decided in Curtiss-Wright's favor. With the exception of that legal issue, there is no dispute that Curtiss-Wright is entitled to final payment upon the subcontracts.

II. The District Judge's Decision

With the case in this posture, more than two years after the filing of the original complaint, the district judge granted Curtiss-Wright's motion for summary judgment on the three subcontract claims. The court then made both the "express direction" for entry of judgment and the determination that there was "no just reason" for delay required by Rule 54(b). In doing so, it complied fully with this court's decision in *Allis-Chalmers Corp.* v. *Philadelphia Electric Co.,* 521 F.2d 360 (3d Cir. 1975), by providing a carefully considered written statement of reasons supporting the decision to direct entry of a final judgment. In that statement the court noted that the certification remedy was to be reserved for "the infrequent harsh case." Moreover, he found that the presence of General Electric's counterclaim, and the consequent possibility of a setoff, militated against certification. But on balance, he concluded that sound judicial administration and fairness to litigants would ultimately be advanced by certification. With regard to judicial administration, the court found that the certification of the order as a final judgment could not result in unnecessary or duplicative appellate review: the contract claim was "separate, distinct, and independent of any other claims in this lawsuit," and would not be mooted by further proceedings in the case. The district court also concluded that certification would cause delay or inefficiency at the trial court level, since the other claims in the case could be prepared for trial during the pendency of the appeal.

On the issue of fairness to the litigants, the district court noted that until judgment was entered on the contract counts Curtiss-Wright would be entitled only to 6% prejudgment interest on its $19 million claim, and would be required to absorb the difference between that rate and the much higher market rate of interest, thereby suffering "daily financial losses from nonpayment of these liquidated debts." This injustice, the court concluded, could prove exceptionally severe since "because of the complex nature of the remaining claims in this case, the delay in payment which would occur if certification were denied would span many months, if not years."

III. The Panel Majority Opinion

The panel majority opinion rejects the district court's carefully considered decision on two grounds. First, it postulates that *Allis-Chalmers Corp.* v. *Philadelphia Electric Co., supra,* establishes blanket presumption against the certification of separate claims where a counterclaim is pending. Second, it holds as a matter of law the district court could not have viewed the loss of over one million dollars in annual interest, even for a period of "many months or years," as a "harsh circumstance" sufficient to overcome that presumption and permit an immediate appeal. It therefore concludes that, despite the district judge's unchallenged finding that this appeal poses no risk of delay or wasted effort at either the trial court or appellate level, the decision to enter final judgment on the $19 million claim must be reversed.

IV. The Panel Majority's Use of Precedent

The panel majority opinion effectively holds that the district court may not enter a Rule 54(b) money judgment in an action in which a non-frivolous counterclaim has been

filed unless the party seeking to recover on the judgment is insolvent. The opinion makes no serious effort to justify this result. Rather, it asserts that its decision is compelled by this court's decision in *Allis-Chalmers*. In support of this conclusion, however, it cites not to the *Allis-Chalmers* majority opinion, but to my *dissent* in that case.

I am underwhelmed. First, as Judge Rosenn points out,[3] Judge Garth's majority opinion in *Allis-Chalmers* stresses that the reversal and remand of the Rule 54(b) certification in that case did *not* rest on a determination "that this was an improper case for Rule 54(b) certification." 521 F.2d at 367 n.16. According to the *Allis-Chalmers* court the remand was "*only* for a *statement of reasons*," and "express[ed] no opinion on" the merits. *Id.* (emphasis in original). Second, contrary to the panel majority's assertion, my dissent in *Allis-Chalmers* was not directed to the majority's improper evaluation of the merits of the certification, but rather to its unprecedented and unwarranted imposition of a "statement of reasons" requirement in a case where the justification for certification was glaringly apparent on the face of the record. This is evident from even a cursory reading of the passage cited by the panel majority. *See* 521 F.2d at 367. Finally, although *dicta* in *Allis-Chalmers* might be read to cut against certification here, there is, as Judge Rosenn demonstrates,[4] other language in the opinion which would permit and indeed encourage the result reached by

[3] Dissenting Opinion at 9.

[4] Dissenting Opinion at 8.

the district court.[5] The majority's unsupported conclusion that *Allis-Chalmers* controls here simply cannot be credited.

V. Analysis

The fact that the panel majority opinion is neither controlled nor supported by prior precedent does not of course demonstrate that its holding is erroneous, or that it warrants the court's *en banc* consideration. Thus I turn to the substance of the panel majority's argument.

A. *The Creation of a Presumption against Certification in Suits involving Counterclaims*

The first holding is that the presence of a counterclaim is an action for money damages creates a presumption against a Rule 54(b) certification. This is a gross oversimplification of the Rule 54(b) inquiry, and conflicts with prior decisions of the Supreme Court and of this court sitting *en banc*. True, "[t]he district court's discretion in entering a Rule 54(b) certificate where a counterclaim is involved should be exercised with special care." 6 *Moore's Federal Practice* ¶ 54.35 at 585 (2d ed. 1976). The reason is straightforward: experience shows that in cases where a counterclaim (particularly a compulsory counterclaim) has been filed, there is an increased possibility that there

[5] It is worth noting that the district judge in *Allis-Chalmers* clearly did not regard that decision as barring Rule 54 certification of a money judgment when a counterclaim was pending. On remand, after preparing the "statement of reasons" demanded by the *Allis-Chalmers* majority, he immediately reentered judgment upon the claim. *See Note,* 54 N.C.L. Rev. 1265, 1274 n.58 (1976).

will be some "just reason" to delay the entry of judgment. For example, the presence of a compulsory counterclaim may indicate that there is a risk that in a second appeal from judgment on the counterclaim the court of appeals will be required to consider virtually the same factual and legal questions presented in the Rule 54(b) appeal. *Panichella* v. *Pennsylvania R.R. Co.*, 252 F.2d 452, 455 (3d Cir. 1958). In other counterclaim cases, there may be a risk that a Rule 54(b) appeal will simply "delay the trial of the [counterclaim] without in any way simplifying or facilitating its future litigation." *Id.* at 455; *Campbell* v. *Westmoreland Farm, Inc.*, 403 F.2d 939, 942 (2d Cir. 1968).

The mere fact that a non-frivolous counterclaim has been filed, however, does not demonstrate that either of these risks is present. There will frequently be cases, like this one, where there is no risk of duplicative appellate review or unwarranted delay of the proceedings in the trial court. In such cases, the fact that a counterclaim has been filed is an essentially neutral factor in the Rule 54(b) analysis. The presence of that claim of course creates a risk that the plaintiff will ultimately be required to pay back a portion of the Rule 54(b) judgment. But there is an equal risk that the counterclaimant will fail to prove his case at trial and will have to pay out. Common sense suggests that where both parties are solvent the party whose claim is liquidated in amount and reduced to judgment generally has the stronger claim to possession of the disputed fund during the litigation of the remaining claims. *See,* Comment, 56 B.U.L. Rev. 579, 592-93 (1976).[6]

[6] The *dictum* in *Allis-Chalmers* that the presence of a counterclaim in a case "weighs heaviy against the grant of a 54(b) certification," 521 F.2d at 366, thus sweeps too broadly and ought not to be followed.

It is here that the central role of the district judge in the operation of Rule 54(b) emerges. If he determines that the counterclaim is substantial and likely to succeed if pressed to judgment, he may well conclude that certification is unwarranted. On the other hand, the judge may also decide that the counterclaim asserted is so much smaller than the liquidated judgment, or so speculative and difficult of proof, that it would be unfair to delay the entry of judgment while the counterclaimant attempts to prove his case. The judge may even conclude that all or part of the counterclaim is being pressed principally to delay payment on the principal obligation, and enter judgment under Rule 54(b) in order to encourage a prompt settlement of the remaining claims in controversy.

The relationship between Rule 54(b) certifications and settlements is, from the viewpoint of the district courts, particularly significant. In commercial litigation it requires little imagination for lawyers to conjure up facially plausible though factually weak counterclaims Experienced lawyers and judges are all to familiar with the possibilities for delay inherent in liberal federal discovery rules. District judges on the scene are particularly well situated to exercise informed judgment as to when the entry of a final judgment on a complaint will remove the incentive for time consuming and costly litigation over "imaginative" counterclaims. They are, moreover, conscious of the fact that resolution, favorably or unfavorably, of a legal issue dispositive of the plaintiff's claim will frequently produce a climate in which serious settlement negotiations will commence and often succeed. The concern of appellate judges for their own caseloads should not blind them to the reality that by limiting the use of Rule 54(b) they are depriving their brothers in the district court of a significant tool in the management of trial court caseloads.

This case is illustrative. The district judge, on the basis of his personal knowledge of the case, concluded that the presence of General Electric's counterclaim was not a just reason for delay. Curtiss-Wright's liquidated, undisputed claim for nearly $19 million is opposed by an unliquidated, unproven counterclaim for $60 million. But only $1.9 million of that counterclaim is alleged to represent money actually spent by General Electric. The remaining $52-odd million is claimed on the theory that because General Electric spent $1.9 million and thereby helped Curtiss-Wright to avoid a costly default on the subcontracts, it is therefore entitled to recover from Curtiss the $52 million that Curtiss-Wright would have lost in that default on a theory of unjust enrichment. Without expressing definitive views on the merits of the counterclaim, I think it obvious that the district judge concluded, as I do, that it would be unfair to require the plaintiff to finance the prosecution of this claim with its admitted, liquidated judgment. Nor do I regard it as fatal to the certification that the district judge did not list his skepticism about the merits of the counterclaim as a factor in his *Allis-Chalmers* statement. While a judge may not want to appear to prejudge a highly speculative counterclaim, when exercising a judgment as a Rule 54(b) certification he can hardly be blind to its likely worth or to the probability of its settlement when it ceases to serve as an instrument of delay. The district judge may—and often must—rely in his discretionary decisions upon considerations which propriety dictates cannot and should not be placed on the public record. Where, as here, the trial court's *Allis-Chalmers* statement correctly concludes that immediate appeal would not result in any duplicative review or delay of the trial court proceedings, deference to the district court's appraisal of the justice and practicality of entering an immediate judgment is surely appropriate.

The majority opinion strips the district courts in this circuit of the power to make this sort of discretionary Rule 54(b) determination in all cases involving counterclaims. That result, I submit, is squarely contrary to the well-settled principle that the timing of a Rule 54(b) certificate "is, with good reason, vested primarily in the discretion of the District Court as the one most likely to be familiar with the case and with any justifiable reasons for delay." *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427, 437 (1956). *Accord, Bendix Aviation Corp.* v. *Glass*, 195 F.2d 267, 272 (3d Cir. 1952) (*en banc*) (Maris, J.); 10 C. Wright & A. Miller, *Federal Practice & Procedure* § 2659 at 75 (1973); 6 *Moore's Federal Practice* ¶ 54.28[1] at 364; ¶ 54.41[3] at 741 (2d ed. 1976).

The holding is also inconsistent with this court's decisions in *Cold Metal Process Co.* v. *United Engineering & Foundry Co.*, 221 F.2d 115 (3d Cir. 1955), *aff'd*, 351 U.S. 346 (1956), and *Bendix Aviation Corp.* v. *Glass*, 195 F.2d 267 (3d Cir. 1952) (*en banc*). Both cases upheld the jurisdiction of the court of appeals over claims certified under Rule 54(b) despite the pendency in each case of a compulsory counterclaim, and in the absence of any harsh or unusual circumstances beyond those present in this case. In *Cold Metal Process*, the appeal was from a money judgment entered in a complex commercial case. Despite the presence of a compulsory counterclaim, this court concluded that the appeal was "the very kind of thing Rule 54(b) was written to provide for" and held that the district court had not abused its discretion in authorizing it. 221 F.2d 115, 115. The Supreme Court agreed. 351 U.S. at 450-51. *Bendix Aviation Corp.* v. *Glass, supra*, an *en banc*

decision, reviewed a dismissal of plaintiff's claim for specific performance, certified under Rule 54(b), despite the presence of an unadjudicated counterclaim. These cases directly controvert the majority's holding that the pendency of a counterclaim is, without more, a "just reason" for delay under Rule 54(b). That holding is both inconsistent with precedent and unsound on policy grounds.

B. *The "Financial Hardship" Holding*

Because of the panel majority's erroneous view of the effect of the counterclaim upon the Rule 54(b) determination, it skews the Rule 54(b) determination by requiring a showing of "harsh circumstances" in order to justify appeal. Even if I agreed with its position on the effect of the counterclaim, however, I could not accept the panel majority's assertion that for a solvent plaintiff the deprivation for several years of a mere $19 million to which it is concededly entitled can never amount to "harsh circumstances." As Judge Rosenn persuasively demonstrates,[7] this unprecedented result defies common sense, economic reality, and a square holding to the contrary by the Tenth Circuit in *United Bank of Pueblo* v. *Hartford Accident & Indemnity Co.*, 529 F.2d 490 (10th Cir. 1976). At the very least, Judge Rosenn's carefully limited position—that financial hardship to a solvent debtor should be cognizable in a Rule 54(b) determination under the circumstances of this case—is surely correct.

I would go further. Rule 54(b) allows the entry of judgment on a proven or admitted claim when there is "no just reason" for delaying that judgment. By entering that

[7] Dissenting Opinion at 6-10.

judgment, the district court puts a litigant who would not otherwise be entitled to immediate possession of the disputed fund in a position to execute on the judgment and obtain that fund immediately. In a civil damage action between two solvent parties, it would therefore seem that a needless delay in obtaining possession of a substantial sum of money to which one is entitled under a valid judgment is the *precise* "harsh circumstance" that Rule 54(b) is intended to prevent. The proper rule is that when the district court has determined, as it did here, that "no just reason" exists to delay the entry of judgment, the continued loss of the right to execute on that judgment or obtain a supersedeas bond is *prima facie* an injustice sufficient to support the certification of finality.

Whether one accepts Judge Rosenn's position or mine, however, it is clear that the panel majority's holding is inconsistent with the policy and purposes of Rule 54(b).

VI. Conclusion

Judge Rosenn's dissent demonstrates as well as any opinion can that the panel majority holdings in this case are unsupported by precedent. From what has been said in this opinion, it should also be apparent that these holdings directly undermine the policies which Rule 54(b) seeks to advance. If followed, their effect, I submit, will be to bar the use of Rule 54(b) in "the very kind of case for which Rule 54(b) [was] designed," *Cold Metal Process Co.* v. *United Engineering & Foundry Co.*, 351 U.S. 445, 451 (1951), and to eliminate a significant tool for district court management of the disposition of litigation. Rehearing *en banc* is far more warranted in this case than in many for which we have convened the full court in recent years.

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Moreover, given the conflict between this case and the holding of the Tenth Circuit in *United Bank of Pueblo* v. *Hartford Accident & Indemity Co., supra,* and the recognized lack of coherent standards for the review of Rule 54 certifications, *see* 10 C. Wright & A. Miller, Federal Practice *& Procedure* § 2655 at 39 (1973), this case seems a proper occasion[8] for the Supreme Court to break its 23 year silence regarding the proper administration of Rule 54(b) and to provide some much needed guidance to the courts of appeals and to this court especially.

Judge Rosenn joins in this dissent and votes for rehearing *en banc.*

For the reasons pointed out by Judge Rosenn and Judge Gibbons, Judges Adams and Higginbotham believe that the issues raised in this appeal are of sufficient importance so as to command the attention of the full Court. Accordingly, they vote for rehearing.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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[8] This is particularly the case where, as here, because of recusals only three of seven eligible judges have voted against rehearing *en banc.*

APPENDIX D

Selected Portions of Plaintiff's Interrogatories to Defendant

INTERROGATORY 54

As to each instance in which plaintiff has been unjustly enriched as alleged in paragraph 32 of the Counterclaim:

(a) State the date thereof;

Approximately 1970 through 1973.

(b) State in detail all facts which allegedly support the allegation;

Plaintiff has been unjustly enriched in that Defendant, without compensation from Plaintiff, (i) performed work which was the contractual responsibility of Plaintiff; (ii) prevented substantial losses which otherwise would have befallen Plaintiff; and (iii) averted a probable total default in contract performance.

In addition, Plaintiff has been paid for work which it was contractually obligated to perform, but which in fact was partly performed by Defendant. This included specific advice and assistance for the establishment of adequate training and quality control programs.

These facts are shown by the following subsidiary facts or events, among others:

(1) That Plaintiff underestimated the work and encountered severe difficulties in performance is admitted by the Complaint (*e.g.,* ¶¶ 72-74, 81-84, 109).

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(2) To prevent a severe default by Plaintiff and grave damage to the timely production of components for the Naval Nuclear Program, Defendant (as well as the Navy) had to render advice and assistance to Plaintiff repeatedly in areas of Plaintiff's management responsibility. These included the establishment and conduct of an adequate training program for welders; the need to explain to Plaintiff its deficiencies in instituting systematic quality control measures; the need to follow up repeatedly because of Plaintiff's unwillingness or inability to carry out suggestions concerning the management of its work; and the need to undertake repeated and extraordinary inspections and to recommend corrective measures due to Plaintiff's unacceptable incidences of defective welding. Under the purhase orders, all of these items were the responsibility of Plaintiff, not Defendant. See also answers to Interrogatories 20 and 25 *supra*.

(3) Plaintiff during the period approximately 1970-73 demonstrated no capacity to resolve without such assistance from Defendant (as well as the Navy) its problems stemming from poor workmanship and inadequate training, inspection, and quality control programs. It is reasonably expectable, therefore, that without the extraordinary assistance rendered by Defendant, the problems would not have been resolved, Plaintiff would have suffered great losses, and would have so seriously breached its obligations to supply conforming articles, within agreed upon delivery schedules, as to be in total default on the purchase orders.

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(c) Identify all persons who have knowledge of each fact;

See answers to Interrogatories 20 and 25 *supra*.

(d) Identify each document which discusses, reflects, refers or in any way relates thereto.

See answers to Interrogatories 20 and 25 *supra*.

INTERROGATORY 61

(a) Set forth the total dollar amount of damages claimed by Defendant under Count I of the Counterclaim.

Approximately $1,912,000.

(b) Separately, as to each element of damages, including but not limited to costs or expenses incurred, and/or lost profits, which Defendant seeks to recover under Count I of the Counterclaim:

(i) Set forth the date(s) on which it was incurred;

By Count I, Defendant seeks to recover excess costs and expenses incurred in the following approximate amounts for approximately the years 1970-1973:

1970 — $425,000

1971 — $577,000

1972 — $485,000

1973 — $425,000

(ii) Set forth in detail the substance and purpose thereof;

See responses to Interrogatories 20, 25, 45-47, 54-56 (First Set).

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(iii) Identify each person, whether employed by Defendant or the Government, who authorized, recommended or approved any activity or expenditure pertaining thereto.

W. H. Bruggeman

C. R. Stahl

The Managers of the Machinery Apparatus Operation ("M.A.O.") Sections of Reactor Equipment and Heat Exchangers and Pressurizers during the applicable period (approximately 1970-1973) (See response to Interrogatory 2(c) (First Set).)

The Subsection Managers, of Purchasing and Engineering, for the M.A.O. Sections of Reactor Equipment and Heat Exchangers and Pressurizers during the applicable period. (See response to Interrogatory 2(c) (First Set).)

J. W. Vaughan

When seeking payment from the Government pursuant to its prime contracts with the Navy, Defendant submits its Public Vouchers for Purchases and Services other than Personal to the Defense Contract Audit Agency ("DCAA"), which forwards the Vouchers to the Defense Contract Administration Services Region ("DCASR") in Boston, Massachusetts. Payment to Defendant issues from DCASR.

In addition to the foregoing, information which is discoverable and responsive to this Interrogatory may be derived or ascertained from the records of Defendant as made available, or to be made available, to Plaintiff for inspection and copying in response to Plaintiff's First Request for Production of Documents or Plaintiff's Second Set of Interrogatories, which records include but are not limited to the following or portions thereof:

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Minutes of Meetings between ANSTR and the General Manager of M.A.O.

Minutes of Meetings between Admiral Rickover and the General Manager of M.A.O.

Files of W. A. Northrop

Documents listed in response to Interrogatory 20(c)(v) (First Set)

See also responses to Interrogatories 25(b)(v), 45(c)(v), and 47(b) (First Set).

(iv) Identify the subcontract(s) under which or in connection with which it was incurred;

Each of the twenty-one subcontractors involved in this action.

(v) Set forth in detail the manner in which the dollar amount thereof was calculated, and identify the date(s) on which said calculations were made and the person(s) who performed and/or approved said calculations.

	($ in 000's)				
	1970	*1971*	*1972*	*1973*	*Total*
Total M.A.O. Labor (Large Components Only)	$875	$874	$872	$870	$3491
Percentage of Normal Labor Allocable to Plaintiff	50.9%	67.2%	55.6%	48.6%	55.5%
Normal Labor Assocable to Plaintiff	$445	$587	$484	$422	$1938

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II. Distribution of Normal Labor Allocable to Plaintiff within M.A.O.:

Reactor Equipment Section—35.7%

Heat Exchangers and Pressurizers Section—49.3%

Quality Control and Manufacturing Control and Materials Engineering Sections, and Miscellaneous —15.0%

III. Estimated Percentages in Excess of Normal Labor Expended for Plaintiff During Approximately 1970-1973:

Reactor Equipment Section—100%

Heat Exchangers and Pressurizers Section—25%

Quality Control and Manufacturing Control and Materials Engineering Sections, and Miscellaneous —30%

IV. Calculation of Excess Costs and Expenses Incurred:

Formula—Normal Labor Allocable to Plaintiff X Distribution of Normal Labor Allocable to Plaintiff X Estimated Percentages in Excess of Normal Labor; Plus General and Administrative Expenses and Overhead

	($ in 000's)				
	1970	*1971*	*1972*	*1973*	*Total*
Reactor Equipment Section	$159	$209	$173	$151	$ 692
Heat Exchangers and Pressurizers Section	$ 55	$ 72	$ 60	$ 52	$ 239

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	($ in 000's)				
	1970	*1971*	*1972*	*1973*	*Total*
Quality Control and Manufacturing Control and Materials Engineering Sections, and Miscellaneous	$ 20	$ 26	$ 22	$ 19	$ 87
Subtotal	$234	$307	$255	$222	$1018
Add G & A and Overhead	$191	$270	$230	$203	$ 894
TOTAL COST	$425	$577	$485	$425	$1912

Calculations of the nature set forth above were made on or about June 7, 1977, by J. Russell, with W. A. Northrop, R. Savidge, P. Jones, J. Lavish, and R. Henke, and were reviewed by F. J. Balicki and W. A. Northrop. Calculations of the nature set forth above were also made by J. Russell on or about May 2, 1978, and were reviewed by E. A. Klein and W. A. Northrop.

(vii) State whether Defendant seeks recovery on its own behalf or on behalf of the Navy.

For the ultimate benefit of the United States. Such recovery will initially be by, and payment made to Defendant.

(viii) State whether Defendant has invoiced or otherwise requested reimbursement from the Government therefor, and, if applicable, set forth the dollar amount of the invoice or request and the date thereof.

Yes. Information which is discoverable and responsive to this Interrogatory may be derived or ascertained from the records of Defendant as made available, or to be

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made available, to Plaintiff for inspection and copying in response to Plaintiff's First Request for Production of Documents or Plaintiff's Second Set of Interrogatories, which record include but are not limited to the following or portions thereof:

> "Public Voucher[s] for Purchases and Services other than Personal" produced by letter dated July 28, 1977.

(ix) State whether Defendant has been reimbursed by the Government therefor, and, if applicable, set forth the dollar amount of the reimbursement and the date thereof;

See response to Interrogatory 61(b)(viii) *supra.*

(x) Identify the prime contract(s) and the applicable provisions thereof under which Defendant was reimbursed by the Government thereof;

Prime contracts:

N0024-67-C-5014

N0024-67-C-5016

N0024-67-C-5321

N0024-69-C-5154

N0024-70-C-5027

N0024-71-C-5461

N0024-72-C-5514

N0024-73-C-5024

N0024-74-C-5009

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All the prime contracts listed above are cost-plus-fixed-fee contracts. By their very nature, therefore, they provide for the reimbursement by the Government of allowable costs incurred by Defendant. In addition, this subject is treated in the Article in the General Provisions of each prime contract entitled "Allowable Costs, Fixed Fee, And Payment."

(xi) Set forth the reasons, if any, given by the Government for not reimbursing Defendant in whole or in part therefor. If no reasons were given, so state;

Not applicable.

(xii) Identify each document which discusses, reflects, concerns, or relates thereto, including but not limited to all documents pertaining to the calculation of damages.

Defendant objects to this Interrogatory to the extent that it seeks information which constitutes trade secrets or proprietary information, or information or documents which are protected by the work product privilege or are irrelevant or not reasonably calculated to lead to the discovery of admissible evidence. Without waiving these objections, Defendant makes the following answer.

See responses to Interrogatories 61(b)(ii), 61(b)(iii) and 61(b)(viii) *supra.*

Prime contracts

The twenty-one subcontracts involved in this action.

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INTERROGATORY 69

(a) Set forth the total dollar amount of damages claimed by Defendant under Count V of the Counterclaim.

In excess of $53,993,023.

By Count V of its Counterclaim, Defendant seeks to recover (1) the value of the benefit conferred upon Plaintiff as a result of the assistance furnished to Plaintiff by Defendant which went beyond the tacit understanding described in the response to Interrogatory 15(b) (First Set); and (2) amounts constituting the unjust enrichment of Plaintiff resulting from Plaintiff's avoidance of increased costs, substantial losses, and termination-for-default damages as a result of the extraordinary assistance provided by Defendant. With respect to the value of the benefit conferred upon Plaintiff, the total dollar amount is related to the increased costs which Plaintiff would have incurred but for Defendant's extraordinary assistance. Defendant at present has insufficient information to derive or ascertain the total amount of these costs, but such amount exceeds the estimated $1,912,000 that represents the approximate costs incurred by Defendant in rendering the extraordinary assistance. With respect to the remaining damages sought by Count V, (1) Defendant at present has insufficient information to derive or ascertain the increased costs or losses which Plaintiff would have incurred had not Defendant rendered extraordinary assistance; and (2) an estimate of the total damages for which Plaintiff would have been liable had it been terminated for default is $52,081,023.

(b) Separately, as to each element of damages, including but not limited to unjust enrichment, benefit con-

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ferred, loss to Plaintiff prevented, and/or lost profits, which Defendant seeks to recover under Count V of the Counterclaim:

(i) Set forth the date(s) on which it was incurred;

With respect to the value of the benefit conferred upon Plaintiff, Defendant at present has insufficient information to respond to this Interrogatory. With respect to the remaining damages sought by Count V, such damages are not divisible in the manner requested in this Interrogatory 69(a) *supra.*

(ii) Set forth in detail the nature thereof;

See response to Interrogatory 69(a) *supra.*

(iii) Identify the subcontract(s) under which or in connection with which it occurred;

Each of the twenty-one subcontracts involved in this action.

(iv) Set forth the exact dollar amount thereof;

See response to Interrogatory 69(a) *supra.*

(v) Set forth in detail the manner in which the dollar amount thereof was calculated, and identify the date(s) on which said calculations were made and the person(s) who performed and/or approved said calculations;

With respect to the value of the benefit conferred upon Plaintiff as a result of the extraordinary assistance provided by Defendant, see responses to Interrogatories 61(b)(v) and 69(a) *supra.* With respect to amounts constituting the unjust enrichment of Plaintiff resulting from Plain-

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tiff's avoidance of increased costs and substantial losses, see response to Interrogatory 69(a) *supra*. The following is an estimate of the termination-for-default damages avoided by Plaintiff as a result of Defendant's extraordinary assistance:

Assume termination for default on December 31, 1972.

Purchase Order	*Progress Payments Recalled (Includes allowance for amounts liquidated and amounts applied to purchase of material in progress)*	*Cost to Pack and Ship Material Purchased*	*Excess Costs of Reprocurement*
A-550	$ 1,011,604	$ 687,890	$ 5,231,983
A-595	$ 497,287	$ 338,155	$ 1,575,929
A-641	$ 412,778	$ 280,689	$ 1,549,180
A-642	$ 231,498	$ 157,419	$ 1,223,047
A-656	$ 937,980	$ 637,827	$ 3,189,417
A-661	$ 753,827	$ 512,602	$ 2,336,437
A-675	$ 684,462	$ 465,434	$ 1,825,180
A113	—	—	$ 290,856
B382	$ 396,529	$ 269,639	$ 864,032
B-412	$ 358,496	$ 243,777	$ 897,376
B-423	$ 56,773	$ 38,606	$ 196,759
B-433	$ 284,835	$ 193,688	$ 823,416
B-384	$ 532,689	$ 362,228	$ 2,916,046
B-425	$ 351,532	$ 239,041	$ 838,082

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Purchase Order	*Progress Payments Recalled (Includes allowance for amounts liquidated and amounts applied to purchase of material in progress)*	*Cost to Pack and Ship Material Purchased*	*Excess Costs of Reprocurement*
B-429	$ 1,049,045	$ 813,351	$ 3,033,045
B-452	$ 1,248,498	$ 565,986	$ 2,599,712
B-478	—	—	$ 637,932
B-410	$ 970,148	$ 439,800	$ 3,010,500
B-442	$ 158,849	$ 108,017	$ 627,460
B-451	$ 66,354	$ 45,120	$ 381,755
B-428	$ 452,940	$ 307,999	$ 869,487
TOTAL	$10,456,124	$6,707,268	$34,917,631

Total Estimated Termination-for-Default Damages:

$10,456,124
6,707,268
34,917,631
$52,081,023

Calculations of the nature set forth above were made on or about June 2-6, 1977, and were reviewed by E. A. Klein, J. Holup, F. J. Balicki and W. A. Northrop. Calculations of the nature set forth above were also made on or about April 26, 1978, by A. Keating, J. McKeon, P. Smith, M. Ottati, T. Fallon, J. Maslyn, R. Buck, H. L. D. Boone and D. Fawl; and were reviewed by J. Grout, J. Holup, E. A. Klein and W. A. Northrop.

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(vi) Identify each person, whether employed by Defendant or the Government, who authorized, recommended or approved any activity or expenditure pertaining thereto;

See response to Interrogatory 61(b)(iii) *supra*.

(vii) State whether Defendant seeks recovery on its own behalf or on behalf of the Navy;

For the benefit of Defendant.

(viii) State whether Defendant has invoiced or otherwise requested reimbursement from the Government therefor, and, if applicable, set forth the dollar amount of the invoice or request and the date thereof;

Not applicable.

(ix) State whether Defendant has been reimbursed by the Government therefor, and, if applicable, set forth the dollar amount of the reimbursment and the date thereof;

Not applicable.

(x) Identify the prime contract(s) and the applicable provisions thereof under which Defendant was reimbursed by the Government therefor;

Not applicable.

(xi) Set forth the reasons, if any, given by the Government for not reimbursing Defendant in whole or in part therefor.

If no reasons were given, so state;

Not applicable.

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(xii) Identify each document which discusses, reflects, concerns, or relates thereto, including but not limited to all documents pertaining to the calculation of damages.

See response to Interrogatory 61(b)(xii) *supra*.

(c) State whether the damages claimed by Defendant under Count V of the Counterclaim are in addition to the damages claimed by Defendant under either Counts I, II, III, or IV or whether Count V sets forth an alternate legal theory for recovering damages which Defendant seeks to recover under either Counts I, II, II [*sic*] or IV.

In addition to the damages sought by Counts I—IV of Defendant's Counterclaim.

INTERROGATORY 74

(a) State whether Defendant seeks to recover or set off any element of damage, including but not limited to costs or expenses, lost profits and/or unjust enrichment as the result of any instance of assistance to Plaintiff as set forth in the response to Interrogatories 71 and 72, *supra*.

Yes.

(b) Separately, as to each such instance:

(i) Set forth in detail the substance and purpose of the assistance provided and the date(s) on which it was provided;

See responses to Interrogatories 71(b)(i), 71(b)(ii), 72 and 73(a)(i)-(ii) *supra*.

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(ii) Identify the persons who provided the assistance and the persons to whom it was provided;

See responses to Interrogatories 61(b)(ii), 72(b)(iii), 72(d)(iv), and 73(a)(iii) *supra.*

(iii) Identify each person, whether employed by Defendant or the Government, who authorized, recommended or approved any activity or expenditure pertaining thereto;

See responses to Interrogatories 71(b)(iii), 72 and 73 (a)(iii) *supra.*

(iv) Identify the subcontract(s) under which or in connection with which it was incurred;

Each of the twenty-one subcontracts involved in this action.

(v) Set forth the exact dollar amount thereof;

By Counts I-IV of its Counterclaim, Defendant seeks to recover the cost of only the assistance furnished to Plaintiff by Defendant which went beyond the tacit understanding described in the response to Interrogatory 15(b) (First Set). As to an estimate of the dollar amount sought for this extraordinary assistance, and how it was calculated, see responses to Interrogatories 61(a), 61(b)(v), 63(a), 63(b)(v), 65(a), 65(b)(v), 67(a) and 67 (b)(v) *supra.* The cumulative effect of *all* the assistance provided to Plaintiff by Defendant was the prevention of substantial costs and losses which would have otherwise been incurred by Plaintiff and the avoidance by Plaintiff of substantial damages which would have otherwise arisen if Plaintiff had defaulted on the twenty-one

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subcontracts. By Count V of its Counterclaim, Defendant seeks the recovery of these benefits conferred upon Plaintiff, or costs, losses, and damages avoided. As to an estimate of the dollar amount sought by Count V, and how it was calculated, see responses to Interrogatories 69(a) and 69(b)(v) *supra.*

(vi) Set forth in detail the manner in which the dollar amount thereof was calculated, and identify the date(s) on which said calculations were made and the person(s) who performed and/or approved said calculations;

See response to Interrogatory 74(b)(v) *supra.*

(vii) State whether Defendant seeks recovery on its own behalf or on behalf of the Navy;

See responses to Interrogatories 61(b)(vii), 61(b)(vii), 65(b)(vii), 67(b)(vii) and 69(b)(vii) *supra.*

(viii) State whether Defendant has invoiced or otherwise requested reimbursement from the Government therefor, and, if applicable, set forth the dollar amount of the invoice or request and the date thereof;

See responses to Interrogatories 61(b)(viii), 63(b)(viii), 65(b)(viii), 67(b)(viii), and 69(b)(viii) *supra.*

(ix) State whether Defendant has been reimbursed by the Government therefor, and, if applicable, set forth the dollar amount of the reimbursement and the date thereof;

See responses to Interrogatories 61(b)(ix), 63(b)(ix), 65(b)(ix), 67(b)(ix), 69(b)(ix) *supra.*

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(x) Identify the prime contract(s) and the applicable provisions thereof under which Defendant was reimbursed by the Government therefor;

See responses to Interrogatories 61(b)(x), 63(b)(x), 65(b)(x), 67(b)(x), and 69(b)(x) *supra.*

(xi) Set forth the reasons, if any, given by the Government for not reimbursing Defendant in whole or in part therefor. If no reasons were given, so state;

Not applicable.

(xii) Set forth the date(s) on which Defendant demanded compensation or notified Plaintiff of an intention to set off and identify each person who made such demand or gave such notice and each person upon whom demand or notice was made. If no demand was made or notice given, so state;

See responses to Interrogatories 62(a)(vii), 64(a) (vii), 66(a)(vii), 68(a)(vii), and 70(a)(vii) *supra.*

(xiii) Set forth the date on which Defendant and/or the Government decided that a claim should be made against Plaintiff and identify each person who was involved in so deciding;

See responses to Interrogatories 62(a)(viii), 64(a) (viii), 66(a)(viii), 68(a)(viii), and 70(a)(viii) *supra.*

(xiv) Set forth the date on which Defendant and/or the Government began to maintain a record or account thereof and identify each person who maintained such record or account;

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See responses to Interrogatories 62(a)(ix), 64(a)(ix), 66(a)(ix), 68(a)(ix),and 70(a)(ix) *supra.*

(xv) Separately, as to each subparagraph (i)-(xiv), *supra,* identify each document which discusses, reflects, concerns, or relates to the response thereto.

See responses to Interrogatories 61(b)(xii), 62(a)(xi), 63(b)(xii), 64(a)(xi), 65(b)(xii), 66(a)(xi), 67(b)(xii), 68(a)(xi), 69(b)(xii), 70(a)(xi), 72(a)(ii), 72(b)(ii), 72(c)(iii), 72(d)(v), and 73(b) *supra.*

Supreme Court, U. S.
FILED
NOV 15 1979
MICHAEL RODAK, JR., CLERK

APPENDIX

In The

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-105

CURTISS-WRIGHT CORPORATION,

Petitioner,

vs.

GENERAL ELECTRIC COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED JULY 23, 1979
CERTIORARI GRANTED OCTOBER 1, 1979

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11-29-76	Amendment To And Supplemental Complaint, filed November 18, 1976.
12-9-76	Answer to Amendment To And Supplemental Complaint; and Counterclaim, filed December 8, 1976.
12-28-76	Additional Reply to Counterclaim, filed December 27, 1976.
5-5-77	Notice of Motions of Plaintiff for Summary Judgment on the Amendment To And Supplemental Complaint and to strike Defendant's Seventeenth, Eighteenth, and Nineteenth Defenses to the Amendment To And Supplemental Complaint and to dismiss Defendant's Counterclaim, filed May 3, 1977.
	Affidavit of James H. Sullivan, filed May 3, 1977.
6-1-77	Notice of Motion of Defendant for Summary Judgment on the Amendment To And Supplemental Complaint, filed May 31, 1977.
	Affidavit of F.J. Balicki, filed May 31, 1977.

Affidavit of J.A. Russell, filed May 31, 1977.

Statement of Material Facts As To Which There Is No Genuine Issue, filed May 31, 1977.

9-28-77 Hearing on parties' Motions for Summary Judgment on the Amendment To And Supplemental Complaint and on Plaintiff's Motions to strike Defendant's Seventeenth, Eighteenth, and Nineteenth Defenses to the Amendment To And Supplemental Complaint and to dismiss Defendant's Counterclaim (September 26, 1977).

12-6-77 Opinion on parties' Motions for Summary Judgment on the Amendment To And Supplemental Complaint, filed December 5, 1977.

1-16-78 Notice of Motion of Plaintiff to Settle the Judgment and Order on the parties' Motions for Summary Judgment on the Amendment To And Supplemental Complaint and Plaintiff's Motions to strike Defendant's Seventeenth, Eighteenth, and Nineteenth Defenses and to dismiss Defendant's Counterclaim, filed January 12, 1978.

2-28-78 Order denying Plaintiff's Motions to strike the Seventeenth Defense and to dismiss Defendant's Counterclaim, filed February 24, 1978.

Order granting Plaintiff's Motion for Summary Judgment on the Amendment To And Supplemental Complaint; granting Plaintiff's Motion to strike the Eighteenth and Nineteenth Defenses; denying Defendant's Motion for

Summary Judgment on the Amendment To And Supplemental Complaint; and deferring for later consideration the question of prejudgment interest, filed February 24, 1978.

Letter Opinion on Plaintiff's request for Rule 54(b) certification of Court's ruling of December 5, 1977, filed February 24, 1978.

3-22-78 Notice of Motion of Plaintiff for an Award of Prejudgment Interest on the Amendment To And Supplemental Complaint, filed March 21, 1978.

6-1-78 Hearing on Plaintiff's Motion for an Award of Prejudgment Interest (May 30, 1978).

6-22-78 Opinion on Plaintiff's Motion for an Award of Prejudgment Interest, filed June 20, 1978.

7-24-78 Notice of Motion of Plaintiff for Summary Judgment with Prejudgment Interest on Plaintiff's Additional Supplemental Complaint, filed July 21, 1978.

Fourth Supplemental Affidavit of James H. Sullivan, filed July 21, 1978.

7-28-78 Order granting Plaintiff's Motion for an Award of Prejudgment Interest on the Amendment To And Supplemental Complaint, filed July 27, 1978.

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8-4-78	Notice of Appeal, filed August 3, 1978.
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8-23-78	Supplemental Affidavit of E.A. Klein, filed August 22, 1978.
8-30-78	Additional Supplemental Complaint, filed August 28, 1978.
8-31-78	Order granting Plaintiff's Motion for Summary Judgment with prejudgment interest on Plaintiff's Additional Supplemental Complaint and denying Defendant's Motion for Summary Judgment, filed August 29, 1978.
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9-18-78	Notice of Appeal, filed September 14, 1978.
3-22-79	Argument before the Third Circuit Court of Appeals held.
4-17-79	Opinion and Judgment of the Third Circuit Court of Appeals filed.
4-30-79	Petition by Appellee, Curtiss-Wright Corporation, for rehearing en banc filed.

5-1-79	Appellant's Motion to Amend the Opinion of the Third Circuit Court of Appeals filed.
5-10-79	Response of Appellee, Curtiss-Wright Corporation, to Appellant's Motion to Amend the Opinion filed.
5-11-79	Order of the Third Circuit Court of Appeals Amending Opinion filed.
5-21-79	Order of the Third Circuit Court of Appeals Amending Dissenting Opinion filed.
6-4-79	Order of the Third Circuit Court of Appeals Denying The Petition for Rehearing filed.
	Dissenting Opinion Sur Denial of Petition for Rehearing filed.
6-12-79	Judgment of the Third Circuit Court of Appeals Issued in Lieu of a Formal Mandate filed.

COMPLAINT AND DEMAND FOR JURY TRIAL, FILED APRIL 30, 1976

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 76-794

CURTISS-WRIGHT CORPORATION,

Plaintiff,

vs.

GENERAL ELECTRIC COMPANY,

Defendant.

AS TO ALL COUNTS

JURISDICTION AND VENUE

1. This action is within the jurisdiction of this Court by virtue of Title 28, United States Code, Sections 1332 and 1391.

2. Plaintiff is a corporation incorporated under the laws of the State of Delaware, and has its principal place of business in the Borough of Wood-Ridge, County of Bergen and State of New Jersey, where it is engaged in the business, among others, of manufacturing and selling large metal components for use in the construction of nuclear propulsion plants for U.S. Navy submarines and surface ships.

3. Defendant is a corporation incorporated in the State of New York, and has its principal places of business in states other than Delaware and New Jersey.

Complaint and Demand for Jury Trial

4. Defendant is engaged in the business, among others, of purchasing nuclear propulsion plant components on behalf of or for resale to the United States Navy.

5. Defendant maintains one or more offices in New Jersey.

6. Defendant is subject to the jurisdiction of this Court.

7. The subject matter of this action exceeds Ten Thousand ($10,000.00) Dollars, exclusive of interest and costs, and is between citizens of different states.

FIRST COUNT

8. In or about late 1967 and early 1968, preliminary discussions and negotiations were held between plaintiff, defendant (acting through its Machinery Apparatus Operation, Schenectady, New York), and the U.S. Navy Department to explore the possibility of plaintiff's becoming a supplier of large components used in the construction of nuclear propulsion plants for submarines and surface ships of the United States Navy.

9. Defendant then occupied and continues to occupy to the present time a program and/or contract management role with respect to the award of contracts to private industry for the ultimate procurement by the Navy of these components.

10. During the course of the discussions and negotiations aforesaid, and thereafter, defendant represented to plaintiff that it urgently needed to develop a new source of supply for the components aforesaid by reason of the fact that the existing sources, which possessed the capability and experience for the work, were either abandoning the business or were many months and even years delinquent in performance.

11. Although plaintiff had engaged in the business of manufacturing aircraft engines and missile cases, and possessed manufacturing experience of the kind derived from those businesses, plaintiff had no experience in the manufacture of the said nuclear components.

12. Defendant knew the extent of plaintiff's previous manufacturing experience and capabilities and further knew that plaintiff had no prior experience in the manufacture of said nuclear components.

13. With the knowledge aforesaid, defendant proceeded to induce plaintiff to enter into the business of becoming a supplier of the said components and in furtherance of said inducement, defendant stated to plaintiff that it had searched the length and breadth of the United States and had screened and studied the capabilities of many companies in an effort to find a supplier that was capable of manufacturing the components. Defendant assured plaintiff that defendant knew exactly the kind of capability it was looking for and that plaintiff could do the job with the help of defendant's knowledge, expertise and management competence, inviting and receiving plaintiff's trust and confidence to that effect.

14. On various occasions beginning early in 1968 and continuing thereafter from time to time through 1972, in meetings and conversations held at Wood-Ridge, New Jersey, and elsewhere, defendant, acting through its duly authorized agents, including the General Manager of its Machinery Apparatus Operation, induced plaintiff to enter into the business of manufacturing nuclear components and into a series of twenty-one contracts relating to same.

15. Said contracts were designated as Purchase Order Nos. A-550, A-595, A-641, A-642, A-656, A-661, B-382, B-423, B-428,

B-412, B-433, B-442, B-384, B-425, B-429, B-410, A-675, A-113, B-451, B-452 and B-478, and pursuant to same plaintiff agreed to manufacture, assemble, inspect, test, sell and deliver to defendant a total of 167 units in the aggregate of ten (10) different types of nuclear components for the aggregate sum of Two Hundred Fourteen Million Six Hundred Thousand ($214,600,000.00) Dollars, which defendant agreed to pay to plaintiff.

16. Defendant induced plaintiff to enter into said business and said contracts by making the following representations of fact to plaintiff:

(a) Defendant represented to plaintiff that plaintiff's entry into the business of manufacturing nuclear components was necessary in the interests of the national defense; that defendant intended to divide the orders for the bulk of the annual requirements for said components between plaintiff and the only then-remaining major source of supply; and that plaintiff would receive repetitive orders building up by 1974 to 8 reactor vessels, 8 reactor vessel closure heads, 8 pressurizers, and 22 steam generators per year.

(b) Defendant represented to plaintiff that, relative to any company then or formerly in the business, defendant and the Navy possessed superior knowledge, expertise, and management competence, in the manner, methods, processes and procedures of manufacturing the said nuclear components, which knowledge, expertise, and management competence equipped defendant to show plaintiff how to manufacture the components in accordance with the requirements of the contracts. Defendant further represented that it would make such knowledge, expertise, and competence available to plaintiff.

(c) Defendant represented to plaintiff that by virtue of defendant's superior knowledge, expertise and competence (1) defendant knew that the delivery schedules defendant was providing in the aforementioned contracts were adequate to cover the time that would reasonably be required by an inexperienced company such as plaintiff to produce the components; (2) defendant knew that the contract prices were more than adequate to cover plaintiff's costs of performance plus a reasonable profit, and; (3) consequently, defendant knew that plaintiff would be in a position of returning excessive profits to defendant under the incentive price revision formula in the contracts.

17. Each and every one of the foregoing representations so made by the defendant was false and fraudulent and/or was made by defendant as part of a scheme or artifice to defraud.

18. The said representations were known by the defendant to be false when made and were made with intent to deceive plaintiff and with the intent that plaintiff rely upon them and to induce plaintiff to become a supplier of said nuclear components, to enter into the aforesaid 21 contracts at the prices and with the delivery schedules therein established, to make large capital expenditures for the construction of a separate factory and special purpose facilities, to divert to the business of manufacturing said nuclear components its most skilled technical and management personnel from other segments of its business and agree not to make changes in such personnel assignments without defendant's approval and to devote extraordinary amounts of management and technical time and attention to the business of producing said nuclear components.

19. The aforesaid representations were material and at the time they were made, plaintiff believed them and did not know the truth and in reliance thereon plaintiff was induced to become a supplier of said nuclear components, to enter into the aforesaid 21 contracts at the prices and with the delivery schedules therein established and thereby to incur huge losses in the performance thereof, to make large capital expenditures for the construction of a separate factory and special purpose facilities and to incur losses on account of the lack of use thereof, and to injure other segments of its business by diverting its most skilled technical and management personnel from such other segments and devoting extraordinary amounts of management and technical time and attention to the business of producing said nuclear components, which losses, expenses and injuries were the proximate result of the aforesaid representations.

20. In reliance upon the aforesaid representations, plaintiff did take the aforementioned actions to its detriment.

21. By reason of the foregoing, defendant is liable to plaintiff for damages, both compensatory and punitive.

WHEREFORE, plaintiff demands judgment on this Count against the defendant as follows:

A. For compensatory damages, general and special;

B. For punitive damages;

C. For interest;

D. For costs of suit;

E. For attorneys fees.

SECOND COUNT

22. Plaintiff repeats and realleges all of the allegations contained in Paragraphs 1 through 21, inclusive, as if set forth at length herein.

23. Defendant, through its agents and employees, conspired with Vice Admiral Hyman G. Rickover of the U. S. Navy in a malicious and willful scheme to create a relationship of trust and confidence between defendant and plaintiff and to deceive plaintiff and deprive plaintiff of its proper costs and profits on the said 21 contracts.

24. The acts and omissions alleged in the First Count were in pursuit of the said conspiracy and scheme.

25. As a result of the foregoing, plaintiff has suffered damages for which defendant is liable to plaintiff.

WHEREFORE, plaintiff demands judgment against defendant as follows:

A. For compensatory damages, general and special;

B. For punitive damages;

C. For interest;

D. For costs of suit;

E. For attorneys fees.

THIRD COUNT

26. Plaintiff repeats and realleges all of the allegations contained in Paragraphs 1 through 16, inclusive, as if set forth at length herein.

27. The foregoing representations so made by defendant were false or erroneous.

28. The said representations were made by the defendant with intent that plaintiff rely upon them, and to induce plaintiff to become a supplier of said nuclear components, to enter into the aforesaid 21 contracts at the prices and with the delivery schedules therein established, to make large capital expenditures for the construction of a separate factory and special purpose facilities, to divert to the business of manufacturing said nuclear components its most skilled technical and management personnel from other segments of its business and agree not to make changes in such personnel assignments without defendant's approval, and to devote extraordinary amounts of management and technical time and attention to the business of producing said nuclear components.

29. Plaintiff repeats and realleges all of the allegations contained in Paragraphs 19 and 20, as if set forth at length herein.

30. As a result of the foregoing, plaintiff has suffered great losses, defendant has been and will be unjustly enriched, and plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff demands judgment against defendant as follows:

A. That the contracts be reformed;

(1) To cover the training, learning, development, practice, quality assurance, rework and other costs of performance incurred or to be incurred by the plaintiff in the first-time manufacture of these nuclear components;

(2) To provide delivery schedules adequate to cover such first-time manufacture of the components by plaintiff;

(3) To provide that plaintiff will earn reasonable profit from such manufacture of the components;

B. That upon the contracts being so reformed, for an accounting, and for the payments due under the contracts as reformed;

C. For such other sums as defendant may be found, on accounting, to be liable to plaintiff as compensation for plaintiff's diversion from its established lines of business of the capital and other resources necessary to enter the business of manufacturing the components;

D. For such damages as plaintiff has sustained or may sustain as a result of any refusal or failure of defendant to recognize and assume obligations coincident with its obligations as reformed;

E. For the specific performance by the defendant of its obligations under said reformed contracts in the future;

F. Or, in the alternative, for compensation in the amount of the reasonable and just value of plaintiff's performance and investment in the business of manufacturing nuclear components;

G. For such further and other relief as plaintiff may be entitled to.

FOURTH COUNT

31. Plaintiff repeats and realleges all of the allegations contained in Paragraphs 1 through 16, inclusive, as if set forth at length herein.

32. Under the aforementioned circumstances and relationship existing between the plaintiff and defendant, plaintiff had a right to rely upon the representations and information given to it by defendant.

33. Defendant owed a duty to plaintiff, if it gave representations or information at all, to do so with due care.

34. Defendant knew said representations and information were desired by plaintiff for the purpose of deciding whether to enter the nuclear components business, that plaintiff intended to rely thereon, and that if said representations and information were false or erroneous, plaintiff would suffer great losses, expenses and injuries.

35. Said representations and information were false or erroneous and negligently made by defendant.

36. The aforesaid representations and information were material and at the time they were made plaintiff believed them

and in reliance thereon entered into the business of becoming a supplier of said nuclear components, entered into the aforesaid 21 contracts at the prices and with the delivery schedules therein established and incurred huge losses in the performance thereof, made large capital expenditures for the construction of a separate factory and special purpose facilities and incurred losses on account of the lack of use thereof, and injured other segments of its business by diverting its most skilled technical and management personnel from such other segments and expending extraordinary amounts of management and technical time and attention to the business of producing said nuclear components, which losses, expenses and injuries were the proximate result of defendant making and providing the aforesaid representations and information.

37. As a result of the foregoing, plaintiff has suffered damages for which defendant is liable to plaintiff.

WHEREFORE, plaintiff demands judgment against defendant as follows:

A. For compensatory damages, general and special;

B. For interest and costs of suit;

C. For attorneys fees.

FIFTH COUNT

38. Plaintiff repeats and realleges all of the allegations contained in Paragraphs 1 through 16, inclusive, as if set forth at length herein.

39. Under all of the circumstances aforesaid, a special relationship of trust and confidence was established between plaintiff and defendant.

40. The foregoing representations made by defendant were false or erroneous.

41. The said misrepresentations made by defendant within the context of the special relationship of trust and confidence developed between plaintiff and defendant, whether purposeful, negligent, or the result of a disregard for the truth of the representations by defendant, induced plaintiff to enter into the said business of becoming a supplier of nuclear components and the said 21 contracts to plaintiff's great damage.

42. In light of all of the foregoing, entry into the business and the said 21 contracts were the result of overreaching by defendants.

43. Defendant's actions in causing plaintiff to enter into said business and the said 21 contracts and the results therein obtaining as to plaintiff are unconscionable.

44. As a result of the foregoing, plaintiff has suffered damages but has no adequate remedy at law.

WHEREFORE, plaintiff demands judgment against defendant as follows:

A. That the contracts be reformed;

(1) To cover the training, learning, development, practice, quality assurance, rework and other costs of performance incurred or to be incurred by the plaintiff in the first-time manufacture of these nuclear components;

(2) To provide delivery schedules adequate to cover such first-time manufacture of the components by plaintiff;

(3) To provide that plaintiff will earn reasonable profit from such manufacture of the components;

B. That upon the contracts being so reformed, for an accounting, and for the payments due under the contracts as reformed;

C. For such other sums as defendant may be found, on accounting, to be liable to plaintiff as compensation for plaintiff's diversion from its established lines of business of the capital and other resources necessary to enter the business of manufacturing the components;

D. For such damages as plaintiff has sustained or may sustain as a result of any refusal or failure of defendant to recognize and assume obligations coincident with its obligations as reformed;

E. For the specific performance by the defendant of its obligations under said reformed contracts in the future;

F. Or, in the alternative, for compensation in the amount of the reasonable and just value of plaintiff's performance and investment in the business of manufacturing nuclear components;

G. For such further and other relief as plaintiff may be entitled to.

SIXTH COUNT

45. Plaintiff repeats and realleges all of the allegations contained in Paragraphs 1 through 15, inclusive, as if set forth at length herein.

46. In the early part of 1968 defendant represented to plaintiff that defendant and the Navy possessed superior knowledge, expertise and management competence in the manner, methods, processes and procedures of manufacturing said nuclear components relative to any company then or formerly in the business.

47. Defendant agreed to provide this knowledge, expertise and competence to plaintiff and show it how to become engaged in the business of manufacture and sale of said components in accordance with the price and delivery schedule terms under which defendant was willing to contract to buy said components; defendant also agreed to divide the orders for the bulk of the annual requirements for said components between plaintiff and the only then-remaining major source of supply; defendant further agreed to place repetitive orders with plaintiff for said components, building up by 1974 to 8 reactor vessels, 8 reactor vessel closure heads, 8 pressurizers and 22 steam generators per year, if plaintiff would become engaged in said business.

48. Defendant knew or should have known that plaintiff entered into the business of manufacturing said components for sale to defendant in reliance on defendant's agreement aforesaid.

49. In reliance on said agreement, plaintiff entered into a series of twenty-one contracts in writing with defendant, designates as Purchase Order Nos. A-550, A-595, A-641, A-661, A-642, A-656, B-382, B-423, B-428, B-412, B-433, B-442, B-384, B-425, B-429, B-410, A-675, A-113, B-451, B-452, and B-478, as aforesaid.

50. In further reliance on said agreement, plaintiff made large capital expenditures for the construction of a separate factory building and for special purpose facilities with which to carry on said business, diverted to said business its most skilled technical and management personnel from other segments of its business and agreed not to make changes in such personnel assignments without defendant's approval, and devoted extraordinary amounts of management and technical time and attention to the business of producing said nuclear components.

51. Before commencing the manufacture of said components plaintiff disclosed to defendant the manner, methods, processes and procedures which plaintiff considered appropriate for their manufacture and sought the knowledge, expertise and competence of defendant in the necessary and proper manner, methods, processes and procedures for said manufacture in accordance with the requirements of the aforementioned contracts.

52. Defendant failed to provide plaintiff with the necessary and proper knowledge, expertise and competence to show it how to manufacture said components as required by the contracts aforesaid.

53. As a proximate result of the foregoing, plaintiff encountered extreme and unusual difficulty and expense and incurred huge losses in the performance of said contracts, made large capital expenditures for the construction of a separate factory and special purpose facilities and incurred losses on account of the lack of use thereof, injured other segments of its business by diverting its most skilled technical and management personnel from such segments and devoting extraordinary amounts of management and technical time and attention to the business of producing said nuclear components, and was otherwise damaged.

WHEREFORE, plaintiff demands judgment against defendant as follows:

A. For compensatory damages, general and special;

B. For interest and costs of suit;

C. For attorneys fees.

SEVENTH COUNT

54. Plaintiff repeats and realleges the allegations contained in paragraphs 45 through 47 as if set forth at length herein.

55. Defendant also represented and agreed that the prices of said contracts were adequate to cover plaintiff's costs of performance, with the knowledge, expertise and competence to be provided by defendant, and to provide a reasonable profit to plaintiff, and that the incentive pricing formula was incorporated into said contracts merely to permit recovery by the defendant for the benefit of the Navy of any underruns in plaintiff's costs of performance of said contracts.

56. Defendant further represented and agreed that defendant's and hence the Navy's need for plaintiff as a new supplier of said nuclear components was not a temporary need arising from the buildup at that time of requirements for said nuclear components but was then foreseeably a need for a new supplier on a continuing basis.

57. Said representations and agreements, in light of all of the circumstances, incorporated and gave rise to an implied covenant of good faith and fair dealing to the effect that plaintiff would recover its costs of performance and realize a reasonable profit while it was learning the business of manufacturing said

nuclear components, and that plaintiff would continue to receive contracts for said nuclear components once it learned the business, provided defendant continued to have requirements for said nuclear components.

58. Plaintiff relied on said covenants and agreements and in consideration thereof agreed to become a supplier of said nuclear components, to enter into the aforesaid 21 contracts at the prices and with the delivery schedules therein established, to make large capital expenditures for the construction of a separate factory and special purpose facilities therefor and to divert skilled technical and management personnel from other segments of its business to the business of producing said nuclear components.

59. In learning how to produce said nuclear components with the benefit of such knowledge, expertise and competence as was supplied by defendant to plaintiff in performing said 21 contracts, plaintiff incurred costs of performance far in excess of the contract prices and was deprived of the reasonable profits expected to be realized from performance of said contracts.

60. Plaintiff has requested defendant to reimburse it for said excess costs of performance and to pay it the reasonable profits expected to be realized through performance, and defendant has breached said covenants and agreements by refusing said request.

61. Since plaintiff has learned how to produce said nuclear components, defendant and said Admiral Rickover have conspired to deprive plaintiff of any additional contracts for the production of said nuclear components, despite the existence of requirements therefor, in order to coerce plaintiff into not enforcing the aforesaid covenant of reimbursement of the costs of performance of said 21 contracts and payment of the

reasonable expected profit to be realized by plaintiff through performance of said contracts. Said conspiracy and defendant's refusal to continue to award contracts to plaintiff for the production of said nuclear components constitutes a breach of the aforesaid covenants and agreements.

WHEREFORE, plaintiff demands judgment against defendant as follows:

A. For compensatory damages, general and special;

B. For interest and costs of suit;

C. For attorneys fees.

EIGHTH COUNT

62. Plaintiff repeats and realleges all of the allegations contained in Paragraphs 1 through 16, inclusive, as if set forth at length herein.

63. During the period 1968 through 1972, defendant awarded plaintiff a series of twenty-one contracts in writing designated as Purchase Order Nos. A-550, A-595, A-641, A-661, A-642, A-656, B-382, B-423, B-428, B-412, B-433, B-442, B-384, B-425, B-429, B-410, A-675, A-113, B-451, B-452, and B-478, as aforesaid.

63. Said contracts specified not only the physical characteristics of the components to be manufactured by plaintiff, but also the qualifications of the welders, weld operators, welding procedures, welding equipment, nondestructive test and inspection personnel, nondestructive test procedures and nondestructive test equipment used to produce them.

64. Defendant warranted that plaintiff, despite plaintiff's lack of prior experience in their manufacture, could produce components of specified physical characteristics by employing personnel, procedures and equipment so qualified.

65. Plaintiff believed the warranty to be true and in reliance thereon proceeded to perform said contracts with personnel, procedures and equipment so qualified.

66. Defendant breached said warranty in that plaintiff's personnel, procedures and equipment, qualified to the specifications aforesaid, were not able to produce components meeting the specified physical characteristics, but produced components which failed to meet the specified physical characteristics and required vast amounts of rework to salvage.

67. Plaintiff's personnel, qualified as aforesaid, had to undergo extensive additional training and learning before they were able to produce components meeting the specified physical characteristics.

68. Plaintiff gave defendant notice of its inability to produce components meeting the specified physical characteristics with personnel, procedures and equipment qualified to said specifications.

69. Defendant failed and refused to make good on its warranty aforesaid.

70. By reason of said breach of warranty, plaintiff had been damaged.

WHEREFORE, plaintiff demands judgment against defendant as follows:

A. For compensatory damages, general and special;

B. For interest and costs of suit,

C. For attorneys fees.

NINTH COUNT

71. Plaintiff repeats and realleges all of the allegations contained in paragraphs 1 through 16, inclusive, as if set forth at length herein.

72. Through mutual mistake of the parties, said contracts did not make adequate provision either in the price or the delivery schedule for the training, learning and practice, the stringency of the quality requirements as interpreted by defendant, the consequent high incidence of rework, or the other extreme difficulty and unusual expense, as well as the normal costs of performance, required on the part of a company such as plaintiff having no prior experience in the business to perform the inherently complex welding and other fabricating and testing operations in order to produce the ten (10) types of components in accordance with the requirements of the contracts.

73. Without prior experience in the unique complexities of nuclear component manufacture, and, at defendant's urging, relying on defendant for guidance, plaintiff did not know of the inherent difficulty of the work and that literally years of first-hand experience and practice are required to perform it successfully.

74. Plaintiff's mistake consisted in the belief that its aerospace manufacturing capability equipped it to perform the contracts and earn a reasonable profit at the prices and delivery schedules fixed therein by defendant, with little or no change in

or addition to that capability, and without having to carry on extensive amounts of training, learning and practice, or encountering the stringent interpretations by defendant of the quality requirements, the consequent high incidence of rework or the other extreme difficulty and unusual expense that it experienced in performing the contracts.

75. Defendant likewise mistakenly believed that plaintiff possessed the kind of capability required to produce the nuclear components in accordance with the terms of the aforesaid contracts without having to carry on extensive amounts of training learning, practice, rework and encountering the other extreme difficulty and unusual expense experienced by the plaintiff as well as the previous companies engaged in their production.

76. It was the intent of the plaintiff and the defendant that plaintiff should be able to perform the aforesaid contracts and, as a result thereof, earn a reasonable profit.

77. In fact, plaintiff has suffered great losses and damages as a result of its performance of the contracts, as aforesaid, and, in light of the price and delivery schedule set by defendant, plaintiff has been frustrated with respect to the mutual intent of both parties that it earn a reasonable profit from the performance of said contracts.

78. Plaintiff requested defendant to increase the price of said contracts to cover the cost of the extensive amounts of training, learning, practice, rework and other extreme difficulty and unusual expense incurred by plaintiff to perform the inherently complex welding and other fabrication and testing operations to produce the components to the exacting, fail-safe quality requirements imposed by defendant, and defendant has refused to do so.

79. Plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff demands judgment against defendant as follows:

A. That the contracts be reformed;

(1) To cover the training, learning, development, practice, quality assurance, rework and other costs of performance incurred or to be incurred by the plaintiff in the first-time manufacture of these nuclear components;

(2) To provide delivery schedules adequate to cover such first-time manufacture of the components by plaintiff;

(3) To provide that plaintiff will earn reasonable profit from such manufacture of the components;

B. That upon the contracts being so reformed, for an accounting, and for the payments due under the contracts as reformed;

C. For such other sums as defendant may be found, on accounting, to be liable to plaintiff as compensation for plaintiff's diversion from its established lines of business of the capital and other resources necessary to enter the business of manufacturing the components;

D. For such damages as plaintiff has sustained or may sustain as a result of any refusal or failure of defendant to recognize and assume obligations coincident with its obligations as reformed;

E. For the specific performance by the defendant of its obligations under said reformed contracts in the future;

F. Or, in the alternative, for compensation in the amount of the reasonable and just value of plaintiff's performance and investment in the business of manufacturing nuclear components;

G. For such further and other relief as plaintiff may be entitled to.

TENTH COUNT

80. Plaintiff repeats and realleges the allegations contained in Paragraphs 1 through 16, inclusive, as if set forth at length herein.

81. Through mistake on the part of plaintiff and misrepresentations or other inequitable conduct on the part of the defendant, said contracts did not make adequate provision either in the price or the delivery schedule for the training, learning and practice, the stringency of the quality requirements as interpreted by defendant, the consequent high incidence of rework, or the other extreme difficulty and unusual expense, as well as the normal costs of performance, required on the part of a company such as plaintiff having no prior experience in the business to perform the inherently complex welding and other fabricating and testing operations in order to produce the ten (10) types of components in accordance with the requirements of the contracts.

82. Without prior experience in the unique complexities of nuclear component manufacture, and, at defendant's urging, relying on defendant for guidance, plaintiff did not know of the

inherent difficulty of the work and that literally years of firsthand experience and practice are required to perform it successfully.

83. Plaintiff's mistake consisted in the belief that its aerospace manufacturing capability equipped it to perform the contracts and earn a resonable profit at the prices and delivery schedules fixed therein by defendant, with little or no change in or addition to that capability, and without having to carry on extensive amounts of training, learning and practice, or encountering the stringent interpretations by defendant of the quality requirements, and consequent high incidence of rework, or the other extreme difficulty and unusual expense that it experienced in performing the contracts.

84. Defendant's misrepresentation or other inequitable conduct consisted in its failure, despite its possession of superior knowledge of the extreme difficulty and unusual expense of producing the components, and of the stringency of the quality requirements as interpreted by defendant, to warn plaintiff thereof.

85. Plaintiff requested defendant to increase the prices of said contracts to cover the cost of the extensive amounts of training, learning, practice, rework and other extreme difficulty and unusual expense incurred by plaintiff to perform the inherently complex welding and other fabrication and testing operations to produce the components to the exacting, fail-safe quality requirements imposed by defendant, and defendant has refused to do so.

86. Plaintiff, as a result of the foregoing, has suffered great losses, but has no adequate remedy at law.

WHEREFORE, plaintiff demands judgment against defendant as follows:

A. That the contracts be reformed;

(1) To cover the training, learning, development, practice, quality assurance, rework and other costs of performance incurred or to be incurred by the plaintiff in the first-time manufacture of these nuclear components;

(2) To provide delivery schedules adequate to cover such first-time manufacture of the components by plaintiff;

(3) To provide that plaintiff will earn reasonable profit from such manufacture of the components;

B. That upon the contracts being so reformed, for an accounting, and for the payments due under the contracts as reformed;

C. For such other sums as defendant may be found, on accounting, to be liable to plaintiff as compensation for plaintiff's diversion from its established lines of business of the capital and other resources necessary to enter the business of manufacturing the components;

D. For such damages as plaintiff has sustained or may sustain as a result of any refusal or failure of defendant to recognize and assume obligations coincident with its obligations as reformed;

E. For the specific performance by the defendant of its obligations under said reformed contracts in the future;

F. Or, in the alternative, for compensation in the amount of the reasonable and just value of plaintiff's performance and investment in the business of manufacturing nuclear components;

G. For such further and other relief as plaintiff may be entitled to.

ELEVENTH COUNT

87. Plaintiff repeats and realleges all of the allegations contained in Paragraphs 1 through 16, inclusive, and Paragraphs 81, 82, 83, and 84, as if set forth at length herein.

88. Defendant further, and with the knowledge that plaintiff was laboring under the said mistaken belief concerning the effect and result of the contracts containing the price and delivery schedules set by defendant, permitted plaintiff to enter into the said contracts, to plaintiff's detriment.

89. Plaintiff repeats and realleges the allegations contained in Paragraphs 85 and 86 as if set forth at length herein.

WHEREFORE, plaintiff demands judgment against defendant as follows:

A. That the contracts be reformed;

(1) To cover the training, learning, development, practice, quality assurance, rework and other costs of performance incurred or to be incurred by the plaintiff in the first-time manufacture of these nuclear components;

(2) To provide delivery schedules adequate to cover such first-time manufacture of the components by plaintiff;

(3) To provide that plaintiff will earn reasonable profit from such manufacture of the components;

B. That upon the contracts being so reformed, for an accounting, and for the payments due under the contracts as reformed;

C. For such other sums as defendant may be found, on accounting, to be liable to plaintiff as compensation for plaintiff's diversion from its established lines of business of the capital and other resources necessary to enter the business of manufacturing the components;

D. For such damages as plaintiff has sustained or may sustain as a result of any refusal or failure of defendant to recognize and assume obligations coincident with its obligations as reformed;

E. For the specific performance by the defendant of its obligations under said reformed contracts in the future;

F. Or, in the alternative, for compensation in the amount of the reasonable and just value of plaintiff's performance and investment in the business of manufacturing nuclear components;

G. For such further and other relief as plaintiff may be entitled to.

TWELFTH COUNT

90. Plaintiff repeats and realleges all of the allegations contained in Paragraphs 1 through 16, inclusive, as if set forth at length herein.

91. In or about May 1971 while plaintiff was performing said contracts, defendant ordered and directed plaintiff to repeat the x-ray testing of the welds by plaintiff on a certain number of components, the welds on which plaintiff had already x-ray tested and found to meet the specification requirements.

92. Defendant's order and direction to plaintiff to re-x-ray the welds was prompted by a complaint made to defendant by a disgruntled employee of plaintiff that x-ray of the welds was not being done in accordance with the specification requirements.

93. Defendant's order and direction was made notwithstanding the fact that defendant participated in the x-ray testing of the welds and knew how it had been performed.

94. Plaintiff performed said work and defendant has accepted the results thereof.

95. The welds re-x-rayed were found to meet specification requirements.

96. Under the circumstances, said re-x-ray of the welds was not reasonably required to substantiate that fact and accordingly constituted changed, extra or substituted work over and above the base work included in the prices of the respective contracts.

97. As a result of the performance of said changed, extra or substituted work, plaintiff's on-going production operations experienced disruption and inefficiency through preoccupation

of plaintiff's quality control personnel and nondestructive test equipment and their resulting inability to timely detect and correct defective and inadequate welds and weld practices as they occurred.

98. As a proximate result of the foregoing facts, defendant is liable to plaintiff for additional compensation by way of a price increase or damages including not only the cost of the re-x-raying, but also the expense of the disruption and inefficiency caused the production operations as aforesaid.

WHEREFORE, plaintiff demands judgment against defendant as follows:

A. For compensatory damages, general and special;

B. For interest and costs of suit;

C. For attorneys fees.

THIRTEENTH COUNT

99. Plaintiff repeats and realleges all of the allegations contained in Paragraphs 1 through 16, inclusive, as if set forth at length herein.

100. In or about October 1973 while plaintiff was performing said contracts, defendant disapproved the procedures used by plaintiff to perform magnetic particle testing.

101. Said disapproval action was taken by defendant notwithstanding the fact that the Government's and defendant's quality control and inspection personnel had theretofore approved plaintiff's training and testing program for its magnetic particle testing personnel and had conducted periodic surveillance audits of their testing.

102. At defendant's order and direction the magnetic particle testing of all affected production hardware in process was done over and defendant has accepted the results thereof.

103. The retested production hardware was found to meet specification requirements.

104. The repeat of the magnetic particle testing was not reasonably required by the terms of plaintiff's contracts to substantiate the fact that said production hardware met specification requirements and accordingly constituted changed, extra or substituted work over and above the base work included in the prices of the respective contracts.

105. As a result of the repeat of the magnetic particle testing, plaintiff's on-going production operations experienced delay, disruption and inefficiency.

106. As a proximate result of the foregoing facts, defendant is liable to plaintiff for additional compensation by way of a price increase or damages including not only the cost of repeating the magnetic particle testing, but also the expense of the aforesaid delay, disruption and inefficiency of its production operations.

WHEREFORE, plaintiff demands judgment against defendant as follows:

A. For compensatory damages, general and special;

B. For interest and costs of suit;

C. For attorneys fees.

FOURTEENTH COUNT

107. Plaintiff repeats and realleges all of the allegations contained in Paragraphs 1 through 13, inclusive, as if set forth at length herein.

108. At the times and places abovementioned, defendant awarded contracts to plaintiff designated as Purchase Order Nos. A-550, A-595, A-641, A-656, A-661, A-675, and A-113 whereby plaintiff agreed, among other things, to manufacture, assemble, inspect, test, deliver and warrant reactor vessel and closure head assemblies, including responsibility for the "design adequacy" of said reactor vessel and closure head assemblies under the conditions therein stated, in consideration for which defendant agreed to pay plaintiff therefor an aggregate price of Ninety-One Million Eight Hundred Twenty-Seven Thousand Three Hundred and Eighty-Eight ($91,827,388) Dollars, as more specifically provided in said contracts.

109. In the course of manufacture of the closure heads, plaintiff encountered dimensional and "fit-up" problems in installing parts thereof known as the "insulation and canning", the solution of which required that changes be made in said insulation and canning as called for by the contract drawings in order to install the same satisfactorily and as contemplated by the contract specifications.

110. Plaintiff made the changes and performed the work incident thereto at the order, direction or request of the defendant and defendant has accepted the results thereof.

111. The aforesaid changes made by plaintiff in the insulation and canning constituted changed, extra or substituted work over and above the base work included in the prices of the respective contracts on account of which defendant is liable to

plaintiff for additional compensation by way of an increase in price or damages.

112. Plaintiff has demanded said price increase or damages and defendant has failed and refused to pay the same.

WHEREFORE, plaintiff demands judgment against defendant as follows:

A. For compensatory damages, general and special;

B. For interest and costs of suit;

C. For attorneys fees.

FIFTEENTH COUNT

113. Plaintiff repeats and realleges all of the allegations contained in Paragraphs 1 through 13, inclusive, and Paragraph 108, as if set forth at length herein.

114. Through mutual mistake of the parties, or through mistake on the part of the plaintiff coupled with misrepresentations or other inequitable conduct on the part of the defendant, the said contracts did not fully and truly express the intention and meaning of the parties as to the conditions, scope or degree of plaintiff's responsibility for the design adequacy of the closure heads insofar as the "insulation and canning" were concerned.

115. The mutual mistake consisted of a failure of the parties to express their understanding that defendant was neither allowing the time that would be required for, nor was it paying for a full design review of all aspects of the design of the

components, that the components had already been built successfully by other contractors, and that plaintiff would only be required to perform a "design audit" to verify that the components as designed would comply with the operating and environmental conditions stated in the specifications.

116. Consequently, plaintiff's design adequacy responsibility did not include the dimensional and fit-up problems that were encountered in installing the insulation and canning.

117. The misrepresentations or other inequitable conduct on the part of the defendant consisted of its representation to plaintiff that the closure heads here in question had been successfully built by previous contractors in accordance with the drawings supplied by defendant, and defendant's failure to disclose to plaintiff that dimensional and fit-up problems respecting the insulation and canning of closure heads made by previous contractors had been encountered.

118. But for the mutual mistake, or the mistake of plaintiff and misrepresentations or other inequitable conduct of defendant, plaintiff would have had no responsibility to make the abovementioned changes required to manufacture the closure heads aforesaid except upon payment therefor as for changed, extra or substituted work.

119. As a result of the foregoing, defendant is liable to plaintiff for additional compensation by way of a price increase or damages.

120. Plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff demands judgment against defendant as follows:

A. That the affected contracts be reformed to provide that resolution of the dimensional and fit-up problem encountered in installing the insulation and canning constitutes changed, extra or substituted work for which plaintiff is entitled to additional compensation in the amount of $251,973.00;

B. That upon the contracts being so reformed, for an accounting, and for the payments due under the contracts as reformed;

C. For such other sums as defendant may be found, on accounting, to be indebted to the plaintiff under said reformed contracts;

D. For such damages as plaintiff has sustained or may sustain as a result of any refusal or failure of defendant to perform its obligations under the aforesaid contracts as reformed;

E. For such further and other relief as plaintiff may be entitled to.

SIXTEENTH COUNT

121. Plaintiff repeats and realleges all of the allegations contained in Paragraph 1 through 13, inclusive, and Paragraph 63 as if set forth at length herein.

122. In the case of Purchase Order Nos. A-595, A-641, and A-656, plaintiff was not responsible for the design adequacy of the closure heads being manufactured thereunder inasmuch as the conditions under which it was to become responsible were not satisfied.

123. Until said conditions were satisfied, defendant is liable under said contracts in the case of any inadequacies in the design of the closure heads, as depicted in the contract drawings, to pay plaintiff additional compensation by way of a price increase or damages for any changes in said closure heads and the drawings thereof in order to make the design conform to the requirements of the specifications.

124. Plaintiff has fully preformed all the conditions of the contracts on its part and has claimed additional compensation under Purchase Order Nos. A-595, A-641, and A-656 on account of said changes, and defendant has failed and refused to pay the same.

WHEREFORE, plaintiff demands judgment against defendant as follows:

A. For compensatory damages, general and special;

B. For interest and costs of suit;

C. For attorneys fees.

CRUMMY, DEL DEO, DOLAN
& PURCELL
Attorneys for Plaintiff

s/ Peter E. Henry
Peter E. Henry

DEMAND FOR TRIAL BY JURY

Please take notice that plaintiff demands trial by jury of all issues so triable.

CRUMMY, DEL DEO, DOLAN
& PURCELL
Attorneys for Plaintiff

s/ Peter E. Henry
Peter E. Henry

ANSWER AND COUNTERCLAIM, FILED AUGUST 25, 1976

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 76-794

[TITLE OMITTED]

ANSWER AND COUNTERCLAIM

ANSWER

Defendant General Electric Company Answers the Complaint of Plaintiff Curtiss-Wright Corporation, as follows:

1. Defendant admits that there is diversity among the parties but denies that this is an action within the jurisdiction of this Court for the reasons set forth in Fourth, Thirteenth and Fourteenth Defenses set forth below.

2. Admitted.

3. Admitted.

4. Defendant admits that it is engaged, through its Machinery Apparatus Operation, in the business, among others, of purchasing nuclear propulsion plant components on behalf of the United States Navy. Defendant denies that it purchases such components for resale to the Navy.

5. Admitted.

6. Denied for the reasons set forth in the Fourth, Thirteenth and Fourteenth Defenses.

7. Admitted.

Answer and Counterclaim

FIRST COUNT

8. Defendant admits that, during the period specified, discussions and later negotiations were held regarding the possibility of Plaintiff becoming a supplier of large components used in the construction of nuclear propulsion plants for Naval vessels. Defendant avers that said discussions and negotiations resulted from the mutual interests of Plaintiff in entering this field of endeavor and the needs of the Navy. Defendant avers on information and belief that such discussions and/or negotiations did not occur in meetings at which all three parties were present. Defendant denies the remaining allegations of Paragraph 8.

9. Admitted.

10. Defendant admits that it was seeking to develop a new source of supply for the aforesaid components, and that it projected a future need for said new source of supply. Defendant denies the remaining allegations of Paragraph 10.

11. Defendant admits that Plaintiff had engaged in the business of manufacturing aircraft engines and missile cases and that it had not actually manufactured nuclear components of the kind called for in the contracts giving rise to this litigation, although Plaintiff had manufactured other items for the Naval Nuclear Program. Defendant avers that Plaintiff represented, among other things, that its experience in other manufacturing endeavors was transferrable to the Naval Nuclear Program. Defendant denies the remaining allegations of Paragraph 11.

12. Defendant admits that it was aware that Plaintiff had no prior experience in the actual manufacture of the particular nuclear components for the Naval Nuclear Program which were the subject of the contracts giving rise to this litigation. Defendant denies that it knew the extent of Plaintiff's experience

and capabilities to the same degree that Plaintiff knew its own experience and capabilities. Defendant denies the remaining allegations of Paragraph 12.

13. Denied.

14. Defendant admits that, acting on the Navy's behalf, it entered into 21 contracts with Plaintiff relating to the manufacture and sale of nuclear components in the period specified. Defendant denies the remaining allegations of Paragraph 14.

15. Defendant admits that the contracts were designated as purchase orders with the numbers set forth in the Complaint and that Plaintiff agreed, among other obligations under said purchase orders, to manufacture, assemble, inspect, test, sell and deliver certain nuclear components. Defendant denies that said components were sold and delivered to it; and avers that they were sold and delivered to the Navy. Defendant further avers that by its calculation the total number of units was 162. Defendant further states that, although the aggregate price of said purchase orders is approximately as alleged in the Complaint, in view of change orders and other adjustments the exact total is subject to qualification and interpretation. Defendant denies the remaining allegations of Paragraph 15.

16. Denied.

17. Denied.

18. Dcnied.

19. Denied.

20. Denied.

21. Denied.

SECOND COUNT

22. Defendant admits and denies the allegations of Paragraph 22 of the Complaint in the manner set forth in Paragraphs 1 through 21, inclusive, of this Answer.

23. Denied.

24. Denied.

25. Denied.

THIRD COUNT

26. Defendant admits and denies the allegations of Paragraph 26 of the Complaint in the manner set forth in Paragraphs 1 through 16, inclusive, of this Answer.

27. Denied.

28. Denied.

29. Denied.

30. Denied.

FOURTH COUNT

31. Defendant admits and denies the allegations of Paragraph 31 of the Complaint in the manner set forth in Paragraphs 1 through 16, inclusive, of this Answer.

32.-33. Paragraphs 32 and 33 of the Complaint set forth legal conclusions as to which no answer is required; however, if

an answer is required, Defendant denies the allegations of Paragraphs 32 and 33.

34. Denied.

35. Denied.

36. Defendant admits that Plaintiff incurred capital expenditures relating to the performance of the purchase orders. Defendant denies for lack of information the allegations of alleged losses incurred by Plaintiff. Defendant avers that Plaintiff's entry into this business, its signing of the purchase orders, and its making of any investments with respect to the Naval Nuclear Program were the result of business judgments made by Plaintiff, an experienced and substantial firm. Defendant denies the remaining allegations of Paragraph 36.

37. Denied.

FIFTH COUNT

38. Defendant admits and denies the allegations of Paragraph 38 of the Complaint in the manner set forth in Paragraphs 1 through 16, inclusive, of this Answer.

39. Paragraph 39 sets forth a legal conclusion as to which no answer is required; however, if an answer were required, Defendant denies the allegations of Paragraph 39.

40. Denied.

41. Denied.

42. Denied.

43. Denied.

44. Denied.

SIXTH COUNT

45. Defendant admits and denies the allegations of Paragraph 45 of the Complaint in the manner set forth in Paragraphs 1 through 15, inclusive, of this Answer.

46. Denied.

47. Defendant avers that as part of the business relationship between it and Plaintiff, it was understood that Defendant would provide reasonable cooperation, consistent with the contract terms, in furnishing Plaintiff such information pertinent to the performance of the agreements as Defendant possessed but Plaintiff did not. Defendant further avers that said understanding is not contained in any formal agreements, other than as it is implict in the review process provided for in the contracts. Defendant further avers at all times during the course of its business relationship with Plaintiff it not only acted in full conformity with that understanding, but provided Plaintiff with valuable assistance far beyond any requirements of the contract. Defendant denies the remaining allegations of Paragraph 47.

48. Denied.

49. Defendant admits that the listed purchase orders were entered into with Plaintiff, but denies that said actions were "[i]n reliance on said agreement." Defendant denies the remaining allegations of Paragraph 49.

50. Defendant admits that Plaintiff made certain capital expenditures for construction of a separate factory building and

for special purpose facilities. Defendant denies that any such actions of Plaintiff were "[i]n further reliance on said agreement." Defendant denies the remaining allegations of Paragraph 50.

51. Defendant avers that, in accordance with the understanding described in Paragraph 47 of this Answer, from time to time it received from Plaintiff certain information concerning the manner, methods, processes and procedures for manufacturing the components to be delivered, and that it from time to time commented on said information. Defendant further avers that, under the contractual relationships, Plaintiff had the legal duty to devise appropriate manners, methods, processes and procedures that conformed to the Navy's specifications or other requirements. Defendant further avers that it provided Plaintiff with such knowledge or information as was requested or appropriate as set forth in Paragraph 47 of this Answer. Defendant denies the remaining allegations of Paragraph 51.

52. Denied.

53. Defendant admits that Plaintiff made capital expenditures relating to the performance of the purchase orders. Defendant denies for lack of information the allegations that Plaintiff incurred losses in the performance of the purchase orders. Defendant denies the remaining allegations of Paragraph 53.

SEVENTH COUNT

54. Defendant admits and denies the allegations of Paragraph 54 of the Complaint in the manner set forth in Paragraphs 45 through 47, inclusive, of this Answer.

55. Denied.

56. Defendant admits that in the early discussions between Plaintiff and Defendant it was not anticipated that Plaintiff's participation in the Naval Nuclear Program would be "temporary" or that it was related to "temporary" build-ups. Defendant denies, however, that there was any representation, agreement, or assurance as to the scope of the future business to be available to Plaintiff. Defendant further avers that the availability of such business was a matter within the control of persons other than Defendant, including the United States Congress and the Navy. Defendant denies the remaining allegations of Paragraph 56.

57. Denied.

58. Denied.

59. Defendant denies for lack of information the allegations that Plaintiff's cost of performing the 21 contracts exceeded the contract prices. Defendant denies the remaining allegations of Paragraph 59.

60. Denied.

61. Denied.

EIGHTH COUNT

62. Defendant admits and denies the allegations of Paragraph 62 of the Complaint in the manner set forth in Paragraphs 1 through 16, inclusive, of this Answer.

63. Admitted, except that Defendant denies the allegation that such awards or purchase orders were "as aforesaid."

63. Defendant avers that specifications of the components to be manufactured, and qualifications of welders, weld operators, welding procedures, welding equipment, testing procedures, and other items were contained in Navy documents which were incorporated by reference in the purchase orders. Defendant further avers that said documents speak for themselves as to their requirements and that Plaintiff's characterization of them is incomplete. Defendant denies the remaining allegations of Paragraph 63.

64. Denied.

65. Denied.

66. Defendant admits that Plaintiff produced components which failed to meet the specified physical characteristics and which necessitated substantial amounts of rework. Defendant denies that said failure occurred through any action or inaction of Defendant, and further denies the remaining allegations of Paragraph 66.

67. Defendant admits that Plaintiff's welding personnel, although "qualified" in the sense that they had obtained certain required certificates, had to undergo extensive additional training and learning before they were able to produce components meeting specifications. Defendant avers that this failure of Plaintiff to provide personnel able to do the job correctly did not result from any action or inaction of Defendant, and resulted in substantial delays and expenses to Defendant. Defendant denies the remaining allegations of Paragraph 67.

68. Defendant admits that both it and Plaintiff, as well as the Navy, ultimately became aware of Plaintiff's inability or difficulty in producing components meeting specifications.

Defendant denies that this awareness resulted from Plaintiff's giving of "notice." Defendant denies the remaining allegations of Paragraph 68.

69. Denied.

70. Denied.

NINTH COUNT

71. Defendant admits and denies the allegations of Paragraph 71 of the Complaint in the manner set forth in Paragraphs 1 through 16, inclusive, of this Answer.

72. Denied.

73. Denied.

74. Defendant admits that Plaintiff may have made a mistake of business judgment in assessing its own capability to perform the contracts and earn a profit upon them. Defendant denies the remaining allegations of Paragraph 74.

75. Defendant avers that it believed at the outset of its relationship with Plaintiff that Plaintiff did possess the capability required to produce the components, without extreme difficulty and unusual expense. Defendant avers, however, that at all times it was contemplated that additional training, learning, and practice would be required in order for personnel of Plaintiff to be able to accomplish the required work. Defendant denies the remaining allegations of Paragraph 75.

76. Defendant avers that, based largely upon the representations made by the Plaintiff to Defendant and Defendant's assumption that Plaintiff would perform in a

workmanlike manner, Defendant anticipated that Plaintiff would be able to perform the contracts and earn a reasonable profit thereon. Defendant further avers that the profitability of these contracts was subject to risks as is the case with all fixed-price contracts. Defendant denies the remaining allegations of Paragraph 76.

77. Defendant denies for lack of knowledge the allegation that Plaintiff incurred losses in the performance of the purchase orders. Defendant denies the remaining allegations of Paragraph 77.

78. Denied.

79. Denied.

TENTH COUNT

80. Defendant admits and denies the allegations of Paragraph 80 of the Complaint in the manner set forth in Paragraphs 1 through 16, inclusive, of this Answer.

81. Defendant denies for lack of information the allegation that Plaintiff made a unilateral mistake in negotiating provisions of the contract regarding the subjects set forth in Paragraph 81 of the Complaint. Defendant denies that the inclusion or exclusion of any provisions in the contracts was attributable to or resulted from or in any misrepresentation or other inequitable conduct by the Defendant. Defendant denies the remaining allegations of Paragraph 81.

82. Defendant admits that Plaintiff underestimated the difficulty of the work. Defendant denies the remaining allegations of Paragraph 82.

83. Defendant denies for lack of information the allegations of Paragraph 83 concerning the reasons for and substance of Plaintiff's alleged unilateral mistake. Defendant denies the remaining allegations of Paragraph 83.

84. Denied.

85. Denied.

86. Denied.

ELEVENTH COUNT

87. Defendant admits and denies the allegations of Paragraph 87 of the Complaint in the manner set forth in Paragraphs 1 through 16, inclusive, and Paragraphs 81 through 84, inclusive, of this Answer.

88. Denied.

89. Denied.

TWELFTH COUNT

90. Defendant admits and denies the allegations of Paragraph 90 of the Complaint in the manner set forth in Paragraphs 1 through 16, inclusive, of this Answer.

91. Defendant admits that beginning in or about May 1971, Plaintiff, at the request of the Navy as well as Defendant, repeated x-ray testing of certain welds which Plaintiff had made. Defendant denies that Plaintiff was "ordered and directed" by Defendant to perform such tests. Defendant denies for lack of information the allegation that Plaintiff had already found said welds to meet specifications. Defendant denies the remaining allegations of Paragraph 91.

92. Defendant admits that a request that x-ray testing be repeated was made in or about May 1971, and that such request was prompted by a complaint made by an employee of Plaintiff. Defendant avers that said complaint was not only that x-rays of welds were not done in accordance with specifications, but that there had been falsification of radiographic inspection records. Defendant denies that it gave Plaintiff any "order and direction." Defendant denies the remaining allegations of Paragraph 92.

93. Defendant denies that it gave Plaintiff any "order and direction." Defendant admits that some of its employees had some information as to how x-ray testing was performed but denies that it "participated" in that testing. Defendant further avers that said testing and the manner of its performance was the responsibility of Plaintiff. Defendant denies the remaining allegations of Paragraph 93.

94. Defendant admits that Plaintiff performed certain x-ray tests but denies that Defendant "accepted the results thereof." Because it is not clear as to what Plaintiff means by "said work", Defendant is unable fully to answer Paragraph 94 of the Complaint and therefore denies it. Defendant denies the remaining allegations of Paragraph 94.

95. Denied.

96. Denied.

97. Defendant admits that Plaintiff experienced difficulty in timely detecting and correcting defective and inadequate welds and weld practices as they occurred. Defendant denies the remaining allegations of Paragraph 97.

98. Denied.

THIRTEENTH COUNT

99. Defendant admits and denies the allegations of Paragraph 99 of the Complaint in the manner set forth in Paragraphs 1 through 16, inclusive, of this Answer.

100. Defendant admits that it was recommended to Plaintiff that it change the procedures used to perform magnetic particle testing. Defendant denies that said recommendations occurred in or about October 1973, and avers that such recommendations were made at least as early as June 1972. Defendant denies the remaining allegations of Paragraph 100.

101. Defendant admits that it as well as the Government conducted periodic surveillance audits of Plaintiff's testing. Defendant avers that, under the contracts, final responsibility for all these aspects of performance, training, and testing was placed on Plaintiff. Defendant denies the remaining allegations of Paragraph 101.

102. Denied.

103. Denied.

104. Denied.

105. Denied.

106. Denied.

FOURTEENTH COUNT

107. Defendant admits and denies the allegations of Paragraph 107 of the Complaint in the manner set forth in Paragraphs 1 through 13, inclusive, of this Answer.

108. Defendant admits that, acting on behalf of the Navy, it awarded contracts to Plaintiff designated as purchase orders with the numbers set forth in Paragraph 108, and that Plaintiff agreed, among other things, to undertake the duties set forth in Paragraph 108. Defendant avers that the purchase orders speak for themselves as to their contents. Because "the times and places abovementioned" are not specified Defendant denies that allegation of Paragraph 108. Defendant admits that the aggregate purchase price of the eight specified purchase orders is approximately as alleged in Paragraph 108, but avers that the exact aggregate purchase price may be subject to qualification and interpretation. Defendant denies the remaining allegations of Paragraph 108.

109. Defendant admits that in the course of manufacturing closure heads Plaintiff encountered dimensional and "fit-up" problems in installing parts known as "insulation and canning." Defendant further admits that the resolution of these problems required that changes be made in insulation and canning as shown in buyer-furnished drawings, but avers that the allegation of the Complaint is incomplete and misleading in that, under the contracts, design responsibility for such changes was on Plaintiff. Defendant denies the remaining allegations of Paragraph 109.

110. Denied.

111. Denied.

112. Defendant admits that Plaintiff demanded a price increase for the matters alieged in the Fourteenth Count of the Complaint, but denies that Defendant has "failed and refused to pay the same." Defendant instead avers that a request for a change by Plaintiff has not yet been acted upon. Defendant denies the remaining allegations of Paragraph 112.

FIFTEENTH COUNT

113. Defendant admits and denies the allegations of Paragraph 113 of the Complaint in the manner set forth in Paragraphs 1 through 13, inclusive, and Paragraph 108 of this Answer.

114. Denied.

115. Denied.

116. Denied.

117. Denied.

118. Denied.

119. Denied.

120. Denied.

SIXTEENTH COUNT

121. Defendant admits and denies the allegations of Paragraph 121 of the Complaint in the manner set forth in Paragraphs 1 through 13, inclusive, and Paragraph 63 of this Answer.

122. Paragraph 122 primarily sets forth a legal conclusion as to which no answer is required; however, insofar as an answer is required, the allegations of Paragraph 122 are denied.

123. Paragraph 123 of the Complaint sets forth a legal conclusion as to which no answer is required; however, if an answer is required, Defendant denies the allegations of Paragraph 123.

124. Defendant admits that Plaintiff has claimed additional compensation under the specified purchase orders. Defendant denies that Plaintiff has fully performed all the conditions of said contracts. Defendant further denies that it has failed and refused to pay the additional compensation requested by Plaintiff under said purchase orders and avers that the claim has not yet been acted upon. Defendant denies the remaining allegations of Paragraph 124.

FIRST DEFENSE

The Complaint fails to state a claim on which relief can be granted.

SECOND DEFENSE

The claims asserted in the Complaint are barred by the statute of limitations.

THIRD DEFENSE

Any equitable claims asserted in the Complaint which are not barred by the statute of limitations, are barred by laches.

FOURTH DEFENSE

At all times pertinent to the Complaint, and in the performance of its duties relating to the formation and implementation of the contracts which are the subject of the Complaint, Defendant acted on behalf of the Navy. Accordingly;

(a) The claims asserted in the Complaint which sound in tort are barred by the exceptions to the Federal Tort Claims Act, 28 U.S.C. §2680(a) and (h), for discretionary functions, misrepresentation, deceit or interference with contract rights.

(b) Defendant is immune from tort liability in this case under the official immunity doctrine.

(c) The claims asserted in the Complaint which sound in contract cannot be brought to this Court because the claims asserted exceed $10,000, the jurisdictional limit of the Tucker Act, 28 U.S.C. §1346(a).

FIFTH DEFENSE

Any claims asserted in the Complaint based upon fraud or mistake are not stated with particularity and accordingly are fatally defective under Rule 9(b), Federal Rules of Civil Procedure.

SIXTH DEFENSE

Any claims asserted in the Complaint based upon alleged "negligence" of Defendant are barred by the contributory negligence of Plaintiff.

SEVENTH DEFENSE

Plaintiff's claims are barred by its failure to seek relief or exhaust its remedies under the "Changes, Extras and Substitutions" clause of each of the purchase orders.

EIGHTH DEFENSE

Plaintiff's claims are barred by its agreement in the aforesaid "Changes, Extras and Substitutions" clause, that:

> "Buyer will not pay for additional work or extras unless such work or extras have been ordered in writing and the price therefor agreed upon.

Changes made by Seller without an authorized Change Order or Amendment shall be made at the sole risk of Seller, there being no financial recourse against Buyer."

NINTH DEFENSE

Any claims asserted in the Complaint based upon (a) inspections or testing of any work, or approvals of design, drawings, samples, test results, procedures or schedules by the Government or by Defendant; or (b) requirements by the Government or Defendant that Plaintiff correct defects in its work, are barred by the "Inspection" clause of each of the purchase orders, and by the administrative specifications.

TENTH DEFENSE

The Counts of the Complaint asserting "agreements" of Defendant which are not set forth in the purchase orders are barred by the "Contract Rights" clause of these orders.

ELEVENTH DEFENSE

Plaintiff is estopped from maintaining this action or from recovering upon the claims asserted in its Complaint by virtue of various actions taken by it, and/or by failures by it to act, upon which Defendant relied, including but not limited to the following:

(a) Its representations made prior to the formation of its contractual relationship with Defendant, in order to induce Defendant and the Navy to approve it as a contractor for the large components used in the Naval Nuclear Program, that Plaintiff had the expertise and capabilities to perform the contracts satisfactorily in accordance with the Navy's

requirements, and to perform highly skilled work of the type and magnitude required by the Naval Nuclear Program.

(b) Its entry into fixed-price contracts, which are by their very nature inconsistent with Plaintiff's present position that it was assured a profit.

(c) Its agreement to or acquiescence in the activities, such as inspections, additional x-rays, re-welding, etc., which are the subject of the Complaint.

(d) Its inducing of Defendant and the Navy to approve it as contractor for additional purchase orders, and its entry into additional purchase orders, without its having raised any complaints regarding older purchase orders.

(e) Its failure to raise the claims now asserted, while the contracts were being implemented, and despite the extraordinary assistance rendered to Plaintiff by Defendant which benefitted Plaintiff greatly and which prevented Plaintiff from suffering great losses on the purchase orders and/or totally defaulting on them.

(f) Its filing of a request for relief under Public Law 85-804, and various representations and admissions made in conjunction therewith, including that Plaintiff had no adequate judicial remedy and that its losses resulted from Plaintiff's own misjudgments as to the requirements and difficulty of the work.

TWELFTH DEFENSE

The claims asserted in the Complaint have been waived and abandoned by Plaintiff, in light of the considerations set forth in the Eleventh Defense.

THIRTEENTH DEFENSE

The United States is a party that must be joined as to all counts of the Complaint seeking reformation or rescission, since it must approve all modifications or changes or cancellations of contracts in excess of $10,000 between Defendant and Plaintiff. Since the equitable relief sought in the Complaint is incapable of performance those counts seeking such relief must be dismissed under Rule 19, Federal Rules of Civil Procedure.

FOURTEENTH DEFENSE

Counts 3, 5, 9, 10, 11, 15 of the Complaint seeking reformation or rescission are barred by the doctrine of sovereign immunity.

FIFTEENTH DEFENSE

Plaintiff's requests for equitable relief are barred because it comes into Court with unclean hands.

SIXTEENTH DEFENSE

The Complaint must be dismissed as violative of Rule 8, Federal Rules of Civil Procedure, in that its statements of claims are not "short and plain" and its averments are not "simple, concise, and direct."

SEVENTEENTH DEFENSE

During the course of the performance of the contracts, Plaintiff failed (a) to perform its obligations in a workmanlike manner; (b) to establish on a timely basis adequate quality control programs and procedures; (c) to use personnel with

adequate competence and training in its quality control program, and in production tasks; (d) to supply adequate tooling, machinery and testing equipment; and (e) to establish and implement adequate testing and inspection programs. As a result, Plaintiff produced faulty materials which had to be reworked and retested, caused delays in production and delivery of the components, and caused great additional expense, the costs and damage of which which (sic) must be set-off against any recovery by Plaintiff.

WHEREFORE, Defendant General Electric Company demands that the Complaint be dismissed with prejudice; that costs and its attorney's fees be awarded to Defendant; and that the Court grant to Defendant such other, further and additional relief as may be just and proper.

COUNTERCLAIM

1. During the period 1968 through 1972, Defendant on behalf of the Navy and Plaintiff entered into contracts designated as Purchase Order Nos. A-550, A-595, A-641, A-642, A-656, A-661, B-382, B-423, B-428, B-412, B-433, B-443, B-384, B-425, B-429, B-410, A-675, A-113, B-451, B-452 and B-478.

2. Plaintiff agreed under each of the aforesaid purchase orders to manufacture, for delivery to the Navy, certain large components for use in the construction of nuclear propulsion plants for Naval vessels.

3. Under the aforesaid purchase orders, Plaintiff agreed and undertook the obligations, among others, of training welders and other personnel to Navy requirements; of furnishing and using employees competent to perform welding, weld-testing and other skilled tasks contemplated by the agreements; and of constructing the components to Navy specifications and to deliver the components in accordance with specified delivery schedules.

4. Plaintiff agreed and was obligated to furnish and use adequate tooling, machinery and testing equipment to perform the work under the purchase orders in a timely and workmanlike manner, consistent with the high standards of the Naval Nuclear Program.

5. Plaintiff did not perform its obligations under the agreement in a competent, workmanlike manner in that:

(a) Its management did not establish quality control programs and procedures adequate or in time to assure the production of components of the high quality and on the schedule required for the Navy's program, and did not use personnel with sufficient competence and training to carry out a quality control program of the sophistication required for work of the nature required by the purchase orders.

(b) It failed to establish adequate training programs for welders.

(c) It failed to supply welders with the ability to perform the required work correctly and timely.

(d) Its employees produced numerous defective welds, and failed to find defects in its welds.

(e) It failed to supply tooling, machinery, and testing equipment adequate to perform the work as required and in a timely fashion, but instead supplied inadequate and old tooling, machinery and testing equipment.

(f) It failed to establish and implement testing and inspection programs and practices adequate to find and correct construction defects in a timely and efficient manner.

6. Each of the defects in its performance as set forth in Paragraph 5 above was pointed out to Plaintiff by representatives of the Navy and/or Defendant, who made specific recommendations to assist Plaintiff in curing the defects, and/or avoiding future or repeated defects. Plaintiff either failed to accept the recommendations, failed to carry out fully recommendations which it did accept, or did so in an untimely manner after further delays and expenditures had resulted from its actions.

7. As a direct result of the matters set forth in Paragraphs 5 and 6 above, substantial delays occurred in the progress of the work which Plaintiff was obligated to perform, numerous errors were made by Plaintiff in the production and testing of the components which Plaintiff was obligated to deliver, much of the work which Plaintiff performed had to be redone, and much work had to be deferred while Plaintiff corrected its errors and belatedly revised its quality control, testing and training programs.

8. Also as a direct result of the matters set forth in Paragraphs 5 and 6 above, it became necessary for Defendant to make extraordinary efforts, far beyond those contemplated by the contract or anticipated as a part of the normal cooperation of contracting parties acting in good faith, in order to prevent a major default in the performance of its and Plaintiff's obligations to the Navy. Defendant's efforts included special assistance to Plaintiff to help it to correct its deficiencies in each of the areas set forth in Paragraph 5 above and to establish quality control and testing programs adequate to meet the high standards of the Naval Nuclear Program.

9. Defendant's provision of intensive and special assistance to Plaintiff conferred great benefits upon Plaintiff, in that (a) Defendant performed work which was the contractual

responsibility of Plaintiff; (b) prevented substantial losses which otherwise would have befallen Plaintiff; and (c) averted a probable total default in contract performance by Plaintiff and the termination of Plaintiff's position as a supplier of large components to the Naval Nuclear Program.

10. Defendant has not been compensated in whole or in any part, for the benefits it conferred upon Plaintiff nor for the losses to Plaintiff which Defendant's efforts averted.

11. Plaintiff caused great increases in the costs of the production and delivery of the nuclear components required by the purchase orders, which costs in part were passed on to, and borne by, the Navy.

12. At all times pertinent hereto, in its relationship with Plaintiff, Defendant was a contractor of the Navy and was acting on the Navy's behalf.

COUNT I

13. Defendant repeats and realleges the allegations of Paragraphs 1-12, inclusive, of this Counterclaim.

14. Plaintiff breached its obligations under the purchase orders to manufacture and deliver said components for the Naval Nuclear Program.

15. Said breaches by Plaintiff of its obligations resulted in substantial damages, which Defendant is entitled to recover from Plaintiff for the ultimate benefit of the United States.

COUNT II

16. Defendant repeats and realleges the allegations of Paragraphs 1-12, inclusive, of this Counterclaim.

17. Plaintiff impliedly warranted that it would perform the obligations under the purchase orders in a workmanlike manner, and would provide competent management, adequate tools and machinery, adequate training and testing procedures, and adequate quality control procedures.

18. Plaintiff breached the warranty described in Paragraph 17 above.

19. Said breach by Plaintiff of its warranty resulted in substantial damages, which Defendant is entitled to recover from Plaintiff for the ultimate benefit of the United States.

COUNT III

20. Defendant repeats and realleges the allegations of Paragraphs 1-12, inclusive, of this Counterclaim.

21. During the negotiations leading up to Plaintiff's entry into the Naval Nuclear Program, Plaintiff represented that it was competent to manufacture and deliver large components for the Naval Nuclear Program; and that its experience in aerospace projects qualified it to perform the necessary tasks, including welding of large components for the Naval Nuclear Program.

22. During the performance of the purchase orders set forth in Paragraph 1 of this Counterclaim, Plaintiff represented that it was capable of instituting and would institute additional quality control procedures, and that it would apply or install tooling, machinery, training and testing procedures, and use personnel, adequate to manufacture the items in a timely and workmanlike manner consistent with the high standards of the Naval Nuclear Program.

23. The representations described in Paragraph 21 and 22 were made to induce Defendant and the Navy to accept Plaintiff as a contractor for large components in the Naval Nuclear Program, to agree to enter into or approve additional purchase orders with Plaintiff, and/or to refrain from declaring Plaintiff in default, as they had a right to do in view of the acts and omissions alleged in Paragraphs 1-12.

24. Defendant and the Navy relied upon the aforesaid representations of Plaintiff in accepting Plaintiff as a supplier, in issuing it additional purchase orders, and in not terminating it for default.

25. The aforesaid representations were false and unfounded and were not carried out by Plaintiff.

26. Said representations by Plaintiff, and Plaintiff's failure to carry out these representations, resulted in substantial damages, which Defendant is entitled to recover from Plaintiff for the ultimate benefit of the United States.

COUNT IV

27. Defendant repeats and realleges the allegations of Paragraphs 1-12 and 21-26, inclusive, of this Counterclaim.

28. By virtue of the representations set forth in Paragraphs 21-26, Plaintiff expressly warranted its ability and capacity to perform in a timely and workmanlike manner the work required by the purchase orders, consistent with the high standards of the Naval Nuclear Program.

29. Plaintiff breached the warranty described in Paragraph 28 above.

30. Said breach by Plaintiff of its warranty resulted in substantial damages, which Defendant is entitled to recover from Plaintiff for the ultimate benefit of the United States.

COUNT V

31. Defendant repeats and realleges the allegations of Paragraphs 1-30, inclusive, of this Counterclaim.

32. As the result of Defendant's assistance to Plaintiff in the performance of Plaintiff's contractual duties, as alleged in Paragraph 9 of this Counterclaim, Plaintiff has been unjustly enriched.

33. Plaintiff is liable to Defendant for the benefits conferred, or losses to Plaintiff prevented, through Defendant's actions.

WHEREFORE, Defendant demands as relief from Plaintiff the following damages:

1. The damages and additional costs incurred as a result of the actions and inactions of Plaintiff complained of in this Counterclaim.

2. The value of the benefits and avoidance of losses conferred upon Plaintiff through Defendant's efforts alleged in Paragraph 32 and 33 of this Counterclaim.

3. Defendant's costs, disbursements and attorney's fees of this litigation.

4. Such other, further and additional relief as to this Court may seem just and proper.

COLE AND GRONER, P.C.

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REPLY TO COUNTERCLAIM, FILED OCTOBER 15, 1976

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 76-794

(Judge Coolahan)

[TITLE OMITTED]

Curtiss-Wright Corporation replies to the Counterclaim herein of General Electric Company as follows:

1. Plaintiff admits that it entered into various contracts with defendant as designated by the purchase order numbers set forth in paragraph 1 of the Counterclaim, except that No. B-443 should be B-442, but denies that it entered into said contracts with the Navy directly or with defendant on behalf of the Navy.

2. Plaintiff avers that the aforesaid purchase orders speak for themselves, but admits that the components manufactured by it are and were intended for use in the construction of nuclear propulsion plants for Naval vessels.

3. Plaintiff denies the allegations of paragraph 3 of the Counterclaim and avers that the aforesaid purchase orders speak for themselves concerning plaintiff's obligations set forth therein. Plaintiff further avers that it is entitled to have its agreements and obligations as set forth in the purchase orders modified and reformed by reason of the matters set forth in the Complaint.

4. Plaintiff denies the allegations of paragraph 4 of the Counterclaim and avers that the aforesaid purchase orders speak for themselves concerning plaintiff's obligations set forth therein. Plaintiff further avers that is is entitled to have its agreements and obligations as set forth in the purchase orders modified and reformed by reason of the matters set forth in the Complaint.

Reply to Counterclaim

5. Plaintiff denies each and every allegation set forth in paragraph 5 of the Counterclaim.

6. Plaintiff denies each and every allegation of paragraph 6 of the Counterclaim.

7. Plaintiff denies each and every allegation of paragraph 7 of the Counterclaim.

8. Plaintiff denies each and every allegation of paragraph 8 of the Counterclaim.

9. Plaintiff denies each and every allegation of paragraph 9 of the Counterclaim.

10. Plaintiff denies that defendant's efforts averted any losses to plaintiff or that defendant conferred upon plaintiff any benefits or that defendant is entitled to compensation from plaintiff.

11. Plaintiff denies each and every allegation of paragraph 11 of the Counterclaim.

12. Plaintiff admits that defendant was a contractor of the Navy but denies the remaining allegations of paragraph 12 of the Counterclaim.

COUNT I

13. Plaintiff repeats and realleges its responses to paragraphs 1 through 12 of the Counterclaim as if set forth at length herein.

14. Plaintiff denies each and every allegation of paragraph 14 of the Counterclaim.

Reply to Counterclaim

15. Plaintiff denies each and every allegation of paragraph 15 of the Counterclaim.

COUNT II

16. Plaintiff repeats and realleges its responses to paragraphs 1 through 12 of the Counterclaim as if set forth at length herein.

17. Plaintiff denies each and every allegation of paragraph 17 of the Counterclaim.

18. Plaintiff denies each and every allegation of paragraph 18 of the Counterclaim.

19. Plaintiff denies each and every allegation of paragraph 19 of the Counterclaim.

COUNT III

20. Plaintiff repeats and realleges its responses to paragraphs 1 through 12 of the Counterclaim as if set forth at length herein.

21. Plaintiff denies each and every allegation of paragraph 21 of the Counterclaim. Any statement, written or otherwise, by plaintiff with respect to its competence to manufacture and deliver large components for the Naval nuclear program resulted directly from and were dependent upon defendant's assurances, agreements, representations, and warranties to plaintiff as set forth in paragraphs 13, 16(b), 16(c), 46-48, 64, 65 and 82 of the Complaint in this action, or were based upon the mutual mistake of the parties as set forth in the Ninth Count of the Complaint, or were based upon the mistake of plaintiff and the misrepresentations and other inequitable conduct of defendant as set forth in the Tenth Count of the Complaint.

22. Plaintiff denies each and every allegation of paragraph 22 of the Counterclaim. Any statements, written or otherwise, by plaintiff with respect to its capability to institute and intention to institute additional quality control procedures, and its intention to apply or install tooling, machinery, training and testing procedures, and use personnel adequate to manufacture the items in a timely and workmanlike manner consistent with the high standards of the Naval nuclear program, resulted directly from and were dependent upon defendant's assurances, agreements, representations and warranties to plaintiff as set forth in paragraphs 13, 16(b), 16(c), 46-48, 64, 65 and 82 of the Complaint in this action, or were based upon the mutual mistake of the parties as set forth in the Ninth Count of the Complaint, or were based upon the mistake of plaintiff and the misrepresentations and other inequitable conduct of defendant as set forth in the Tenth Count of the Complaint.

23. Plaintiff denies each and every allegation of paragraph 23 of the Counterclaim.

24. Plaintiff denies each and every allegation of paragraph 24 of the Counterclaim.

25. Plaintiff denies each and every allegation of paragraph 25 of the Counterclaim.

26. Plaintiff denies each and every allegation of paragraph 26 of the Counterclaim.

COUNT IV

27. Plaintiff repeats and realleges its responses to paragraphs 1 through 12 and 21 through 26 of the Counterclaim as if set forth at length herein.

28. Plaintiff denies each and every allegation of paragraph 28 of the Counterclaim.

29. Plaintiff denies each and every allegation of paragraph 29 of the Counterclaim.

30. Plaintiff denies each and every allegation of paragraph 30 of the Counterclaim.

COUNT V

31. Plaintiff repeats and realleges its responses to paragraphs 1 through 30 of the Counterclaim as if set forth at length herein.

32. Plaintiff denies each and every allegation of paragraph 32 of the Counterclaim.

33. Plaintiff denies each and every allegation of paragraph 33 of the Counterclaim.

FIRST AFFIRMATIVE DEFENSE

Each Count of the Counterclaim fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Defendant has no standing to assert those claims of the Counterclaim seeking recovery on behalf or for the benefit of the United States.

THIRD AFFIRMATIVE DEFENSE

As to the claims of the Counterclaim brought by defendant on behalf of or for the ultimate benefit of the United States defendant is not the real party in interest.

Reply to Counterclaim

FOURTH AFFIRMATIVE DEFENSE

Defendant is estopped from asserting its Counterclaim by the doctrine of unclean hands, including defendant's fraud, misrepresentations, overreaching, and other inequitable conduct, as well as defendant's breaches of contract, warranty and covenant of good faith and fair dealing. Defendant is further estopped from asserting and/or has waived its rights with respect to the claims in the Counterclaim by permitting plaintiff to expend large amounts of time and money in continued performance of the work and acceptance of said performance.

FIFTH AFFIRMATIVE DEFENSE

Any delays in plaintiff's performance of the work called for by the purchase orders which are the subject of the Counterclaim were caused by defendant's fraud, misrepresentations, overreaching and other inequitable conduct, as well as defendant's breaches of contract, warranty and covenant of good faith and fair dealing. Defendant is also estopped and/or has waived any claims for delay by permitting plaintiff to expend large amounts of time and money in continued performance of the work and acceptance of said performance.

SIXTH AFFIRMATIVE DEFENSE

Any claims asserted in the Counterclaim based upon fraud are not stated with particularity and, accordingly, are fatally defective under Rule 9(b) of the Federal Rules of Civil Procedure.

SEVENTH AFFIRMATIVE DEFENSE

Reply to Counterclaim

In the event that and to the extent that the claims asserted in the Complaint are barred by the statute of limitations, the claims asserted in the Counterclaim are likewise barred.

EIGHTH AFFIRMATIVE DEFENSE

The claims asserted in the Counterclaim are barred by the doctrine of laches.

WHEREFORE, plaintiff, Curtiss-Wright Corporation, in addition to the demands set forth in its Complaint in this action, demands:

A. That the Counterclaim be dismissed with prejudice.

B. That costs and attorneys fees be awarded to plaintiff.

C. That the Court grant to plaintiff such other further and additional relief as may be just and proper.

CRUMMY, DEL DEO, DOLAN
& PURCELL
Attorneys for Plaintiff

s/ Ralph N. Del Deo
Ralph N. Del Deo

AMENDMENT TO AND SUPPLEMENTAL COMPLAINT, FILED NOVEMBER 18, 1976

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

(Judge Coolahan)
Civil Action No. 76-794

[TITLE OMITTED]

Plaintiff, for its Amendment To And Supplemental Complaint alleges as follows:

SEVENTEENTH COUNT

125. Plaintiff repeats and realleges all of the allegations contained in paragraphs 1 through 7 of the Complaint in this action as if set forth at length herein.

126. From on or about early in 1968 through 1972, on various occasions, plaintiff and defendant entered into a series of 21 contracts pursuant to which plaintiff entered into the business of manufacturing nuclear components and performing related work for the defendant, for the aggregate sum of Two Hundred Fourteen Million Six Hundred Thousand Dollars ($214,600,000.00), which defendant agreed to pay plaintiff.

127. To date, plaintiff has performed all of the terms and conditions of those contracts designated as Purchase Order Nos. B-382, B-384, B-410, B-412 and B-425 on its part to be performed.

128. The balance due on account of the price stipulated in said Purchase Orders, after crediting all progress payments made, is Three Million Six Hundred Seventy-Three Thousand Five Hundred Eighty-Four Dollars ($3,673,584.00) over and

above such unliquidated additional amounts as may be found to be due plaintiff thereon under the foregoing Counts of the Complaint in this action.

129. Defendant has not paid said sum of Three Million Six Hundred Seventy-Three Thousand Five Hundred Eighty-Four Dollars ($3,673,584.00) to plaintiff or any part thereof, although demand therefor has been made.

WHEREFORE, plaintiff demands judgment against defendant on this Count for the sum of $3,673,584.00, interest, and costs.

EIGHTEENTH COUNT

130. Plaintiff repeats and realleges all of the allegations contained in paragraphs 1 through 7 of the Complaint in this action as if set forth at length herein.

131. From on or about early in 1968 through 1972, on various occasions, plaintiff and defendant entered into a series of 21 contracts pursuant to which plaintiff entered into the business of manufacturing nuclear components and performing related work for the defendant, for the aggregate sum of Two Hundred Fourteen Million Six Hundred Thousand Dollars ($214,600.00) which defendant agreed to pay plaintiff.

132. To date, plaintiff has performed all the terms and conditions of those contracts designated as Purchase Order Nos. A-550, A-595, A-642, B-423, B-429, B-433 and B-442 on its part to be performed.

133. The balance due on account of the price stipulated in said Purchase Orders, after crediting all progress payments made, if Four Million Seven Hundred Four Thousand Nine

Hundred Fifty Two Dollars ($4,704,952.00) over and above such unliquidated additional amounts as may be found to be due plaintiff thereon under the foregoing Counts of the Complaint in this action.

134. Defendant has not paid said sum of Four Million Seven Hundred Four Thousand Nine Hundred Fifty Two Dollars ($4,704,952.00) to plaintiff or any part thereof although demand therefor has been made.

WHEREFORE, plaintiff demands judgment against defendant on this Count for the sum of $4,704,952.00, interest, and costs.

CRUMMY, DEL DEO, DOLAN & PURCELL
Attorneys for Plaintiff

s/ Ralph N. Del Deo
Ralph N. Del Deo

ANSWER TO AMENDMENT TO AND SUPPLEMENTAL COMPLAINT AND COUNTERCLAIM, FILED DECEMBER 8, 1976

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 76-794

[TITLE OMITTED]

ANSWER TO AMENDMENT TO AND SUPPLEMENTAL COMPLAINT; AND COUNTERCLAIM OF DEFENDANT GENERAL ELECTRIC COMPANY

Defendant General Electric Company Answers the Amendment to and Supplemental Complaint of Plaintiff Curtiss-Wright Corporation, as follows:

1-124. Defendant admits and denies the allegations of Paragraphs 1 through 124, inclusive, of Plaintiff's Complaint in the manner set forth in Paragraphs 1 through 124, inclusive, of Defendant's Answer.

SEVENTEENTH COUNT

125. Defendant admits and denies the allegations of Paragraph 125 of the Complaint in the manner set forth in Paragraphs 1 through 7, inclusive, of this Answer.

126. Defendant admits that, during the period specified, Plaintiff and Defendant entered into 21 contracts relating to the manufacture and sale of certain nuclear components for the Navy Nuclear Program. Defendant avers that, although the aggregate price of said contracts, which were designated as purchase orders, is approximately as alleged in the Complaint, in view of change orders and other adjustments the exact total is subject to qualification and interpretation. Defendant denies the remaining allegations of Paragraph 126.

127. Defendant admits that Plaintiff has delivered the hardware required by the contracts. Defendant denies the remaining allegations of Paragraph 127.

128. Defendant admits that $3,673,584.00 is the amount representing the redeterminable price, less progress and liquidation payments, under the listed purchase orders. Defendant denies that that amount is a "balance due" to which Plaintiff is entitled. Defendant denies the remaining allegations of Paragraph 128.

129. Admitted.

EIGHTEENTH COUNT

130. Defendant admits and denies the allegations of Paragraph 130 of the Complaint in the manner set forth in Paragraphs 1 through 7, inclusive, of this Answer.

131. Defendant admits that, during the period specified, Plaintiff and Defendant entered into 21 contracts relating to the manufacture and sale of certain nuclear components for the Navy Nuclear Program. Defendant avers that, although the aggregate price of said contracts, which were designated as purchase orders, is approximately as alleged in the Complaint, in view of change orders and other adjustments the exact total is subject to qualification and interpretation. Defendant denies the remaining allegations of Paragraph 131.

132. Defendant admits that Plaintiff has delivered the hardware required by the contracts. Defendant denies the remaining allegations of Paragraph 132.

133. Denied.

134. Admitted.

DEFENSES

Defendant reasserts and incorporates by reference herein its First through Seventeenth Defenses, inclusive, set forth in Defendant's Answer.

EIGHTEENTH DEFENSE

Plaintiff's claim for final payments under Counts 17 and 18 of the Amendment to and Supplemental Complaint are barred by its anticipatory breach of, failure to meet the condition precedent in, and refusal to abide by, Paragraph 5c. of the Terms and Conditions of Purchase applicable to each of the purchase orders.

NINETEENTH DEFENSE

Plaintiff's claims for final payments under Counts 17 and 18 of the Amendment to and Supplemental Complaint are barred by its refusal to enter into an unconditional amendment for redetermination to the purchase orders as required by each of the purchase orders.

WHEREFORE, Defendant General Electric Company demands that the Complaint and the Amendment to and Supplemental Complaint be dismissed with prejudice; that costs and its attorneys' fees be awarded to Defendant; and that the Court grant to Defendant such other, further and additional relief as may be just and proper.

COUNTERCLAIM

1-33. Defendant repeats and realleges the allegations of Paragraphs 1-33, inclusive, of its Counterclaim as if fully set forth herein.

WHEREFORE, Defendant demands as relief from Plaintiff the following damages:

1. The damages and additional costs incurred as a result of the action and inactions of Plaintiff complained of in this Counterclaim.

2. The value of the benefits and avoidance of losses conferred upon Plaintiff through Defendant's efforts alleged in Paragraph 32 and 33 of this Counterclaim.

3. Defendant's costs, disbursements and attorneys' fees of this litigation.

4. Such other, further and additional relief as to this Court may seem just and proper.

COLE AND GRONER, P.C.

s/ Alan Y. Cole
ALAN Y. COLE
WALTER H. FLEISCHER
ALFRED F. BELCUORE
1730 K Street, N.W.
Washington, D.C. 20006

HANNOCH, WEISMAN, STERN & BESSER

s/ Albert G. Besser
ALBERT G. BESSER
744 Broad Street
Newark, New Jersey 07102

Attorneys for Defendant-Counter-Claimant
General Electric Company

Of Counsel:

ROLAND C. RADICE, ESQ.
MICHAEL A. LAMANNA, ESQ.
General Electric Company
One River Road
Schenectady, New York 12345

ADDITIONAL REPLY TO COUNTERCLAIM, FILED DECEMBER 27, 1976

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

(Judge Coolahan)
Civil Action
No. 76-794

[TITLE OMITTED]

Whereas defendant, General Electric Company, has repeated and realleged the allegations of Paragraphs 1-33, inclusive, of its Counterclaim in response to the Amendment To And Supplemental Complaint in this action, plaintiff, Curtiss-Wright Corporation, herein replies to said paragraphs as follows:

1-33. Plaintiff repeats and realleges its responses to paragraphs 1-33 of the Counterclaim as if set forth at length herein.

AFFIRMATIVE DEFENSES

Plaintiff reasserts its First through Eighth Affirmative Defenses to the Counterclaim as if set forth at length herein.

WHEREFORE, plaintiff, Curtiss-Wright Corporation, in addition to the demands set forth in the Amendment To And Supplemental Complaint in this action, demands:

A. That the Counterclaim be dismissed with prejudice.

B. That costs and attorneys fees be awarded to plaintiff.

Additional Reply to Counterclaim

C. That the Court grant to plaintiff such other further and additional relief as may be just and proper.

CRUMMY, DEL DEO, DOLAN
& PURCELL

s/ Ralph N. Del Deo
Ralph N. Del Deo

AFFIDAVIT OF JAMES H. SULLIVAN, FILED MAY 3, 1977, WITH ATTACHMENTS

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 76-794

[TITLE OMITTED]

STATE OF NEW JERSEY :
: SS.:
COUNTY OF BERGEN :

JAMES H. SULLIVAN, being duly sworn according to law, upon his oath, does depose and say:

1. Since April of 1973, I have been employed as Director of Administration — Nuclear Facility by Curtiss-Wright Corporation, plaintiff in the above captioned matter (hereinafter "Curtiss-Wright"), and I am personally familiar with the matters set forth herein.

2. The records of Curtiss-Wright reflect that between May 1, 1968 and September 30, 1970, Curtiss-Wright entered into 21 subcontracts with General Electric Company, defendant, in the above captioned matter (hereinafter "General Electric"), pursuant to which Curtiss-Wright agreed to supply a total of 167 large components for use in nuclear propulsion systems of naval vessels. These 21 contracts are designated as Purchase Orders Nos. A-550, A-595, A-641, A-642, A-656, A-661, B-382, B-423, B-428, B-412, B-433, B-442, B-384, B-425, B-429, B-410, A-675, A-113, B-451, B-452, and B-478 (hereinafter "the 21 Purchase Orders"). Each Purchase Order is subject to the "Terms and Conditions of Purchase", attached hereto as EXHIBIT "D".

3. Curtiss-Wright has made delivery of each of the large components called for by the 12 subcontracts designated as Purchase Orders Nos. A-642, B-412, B-384, B-382, B-423, B-433, A-550, B-425, B-410, B-442, B-595 and B-429 (hereinafter "the 12 Purchase Orders").

4. On October 17, 1975, Curtiss-Wright submitted to General Electric the final invoices for Purchase Order Nos. B-382, B-384, B-412 and B-425, and on November 3, 1975, Curtiss-Wright submitted its final invoice for Purchase Order No. B-410. Each of these invoices was accompanied by a cover letter, a sample of which is attached to this Affidavit as EXHIBIT "B".

5. On December 29, 1975, General Electric returned said invoices to Curtiss-Wright without payment.

6. Subsequently Curtiss-Wright submitted to General Electric the final invoices for Purchase Order Nos. A-642, B-423, B-433, A-550, B-442, A-595 and B-429, and resubmitted the invoices for those Purchase Orders designated in Paragraph 4, *supra*. Each of these invoices was accompanied by a qualified release, a sample of which has been attached to this Affidavit as EXHIBIT "C".

7. As of this date, General Electric has failed to pay each of said invoices.

8. Pursuant to the Terms and Conditions, Paragraph 19, Curtiss-Wright prior to submitting its final invoices on the 12 the Defense Contract Auditing Agency of the United States Department of Defense (hereinafter "DCAA"), which has issued audit reports verifying Curtiss-Wright's cost data in each instance. Based on its audits the DCAA recommended no downward revision of the prices set forth in the 12 Purchase Orders as amended.

9. As to the 5 Purchase Orders designated in Paragraph 4 *supra*, General Electric's acceptance of the DCAA's recommendation of no downward adjustment in the prices set forth in the Purchase Orders as amended was evidenced by General Electric's forwarding of "Final Price Redetermination Amendments" to Curtiss-Wright.

10. As to the 7 Purchase Orders designated in Paragraph 6 *supra*, General Electric as of this date has not forwarded "Final Price Redetermination Amendments". In a written communication to Curtiss-Wright dated February 23, 1976, General Electric took the position that it would not forward these amendments due to the dispute between the parties as to Curtiss-Wright's position that it could submit qualified releases at the time of final invoicing. General Electric did not, however, indicate any disagreement with the DCAA recommendations described in Paragraph 8 *supra*.

11. Attached to this Affidavit as EXHIBIT "A" — Schedule of Liquidated Claims, is a chart which reflects, as to each of the 12 Purchase Orders, (a) a description of the components involved, (b) the date of the original Purchase Order, (c) the date delivery of the large components was completed, (d) the date Curtiss-Wright's final cost data was submitted, (e) the date the DCAA audit was issued, (f) the date the final invoices were submitted and, where applicable, returned and re-submitted, and (g) the total value of the final invoices (hereinafter "the holdbacks").

12. The total amount of holdbacks on the 12 Purchase Orders is $8,378,536.00 exclusive of interest, constituting approximately 10 percent of the total contract prices of the 12 Purchase Orders as amended. On eight of the remaining nine of the 21 Purchase Orders, Plaintiff has completed delivery of the large components called for thereunder. The amount of the holdbacks on these eight Purchase Orders is $9,173,464.00.

13. General Electric's failure to make payment on the invoices listed in Exhibit "A" attached hereto has been the subject of correspondence and discussion between the parties wherein General Electric stated the reasons for its refusal to pay the invoices. The correspondence and discussions dealt solely with Curtiss-Wright's desire to preserve certain claims at the time of final invoicing and General Electric's objection to this position. At no time did General Electric indicate that the amounts of the final invoices were incorrect.

14. To the best of my knowledge, the records of Curtiss-Wright do not reflect nor am I personally aware that, prior to the inception of Civil Action No. 76-794, General Electric or the United States informed Curtiss-Wright that Curtiss-Wright had defaulted on or was in breach of any one of the 21 Purchase Orders which had resulted in outstanding damages to General Electric or the United States. Nor did General Electric or the United States, prior to the inception of Civil Action No. 76-794, ever indicate to Curtiss-Wright any intention to withhold final payment under the 21 Purchase Orders as set-off for damages allegedly suffered by either or both of them.

15. The records of Curtiss-Wright further reflect that on July 2, 1976, for purpose of avoiding further dispute at that time between the parties regarding General Electric's insistence upon Curtiss-Wright's executing unqualified releases, and to permit payment to be made to Curtiss-Wright without prejudice to the position of either party, Curtiss-Wright offered in exchange for payment of the holdbacks, to post a surety payment bond in the amount of the holdbacks, conditioned on the repayment of the holdbacks upon General Electric's demand. As of this date General Electric has failed to substantively respond to this proposal.

Affidavit of James H. Sullivan

s/ James H. Sullivan
JAMES H. SULLIVAN

Sworn to May 2nd, 1977

Affidavit of James H. Sullivan

EXHIBIT "A" — SCHEDULE OF LIQUIDATED CLAIMS

Contract No.	Description	Original P.O. Date	Date Hardware Delivery Completed	Date Final Cost Data Submitted	Date DCAA Audit Issued	INVOICE DATA			$ Value of Holdback Excluding Interest
						Submitted	Returned	Resubmitted	
A642	(1) S6G Vessel, Head, Shield	6/2/69	11/16/73	3/27/75	5/15/75	5/18/76	-	-	$480489
B412	(2) S6G Pressurizers	4/3/69	12/26/73	4/15/75	5/16/75	10/17/75	12/29/75	5/18/76	406208
B384	(12) D2G Steam Generators	12/31/68	1/30/74	3/27/75	5/16/75	10/17/75	12/29/75	5/18/76	1201106
B382	(4) D2G Pressurizers	1/7/69	4/23/74	4/15/75	5/16/75	10/17/75	12/29/75	5/18/76	381582
B423	(1) D2G Pressurizer	9/22/69	5/6/74	5/29/75	6/30/75	5/18/76	-	-	87290
B433	(4) S6G Pressurizers	5/8/70	9/30/74	5/13/75	6/6/75	5/18/76	-	-	480663
A550	(4) D2G Vessels, Heads, Shields	5/1/68	11/23/74	11/13/75	12/18/75	5/18/76	-	-	1475197
B425	(4) D2G Steam Generators	9/15/69	11/20/74	4/1/75	5/15/75	10/17/75	12/29/75	5/18/76	369472
B410	(4) S6G Steam Generators	10/22/69	12/20/74	7/8/75	8/4/75	11/3/75	12/29/75	5/18/76	1315216
442	(3) S6G Pressurizers	9/30/70	3/24/75	11/17/75	1/13/76	5/18/76	-	-	422021
A595	(2) D2G Vessels, Heads, Shields	7/26/68	12/22/76	7/9/76	8/13/76	9/23/76	-	-	263747
B429	(18) D2G Steam Generators	3/10/70	3/31/76	5/24/76	7/27/76	8/30/76	-	-	1495545
									8378536

Affidavit of James H. Sullivan

EXHIBIT B

cc: Sullivan, Lovell, Ahl, Jaugstetter, Janiec

October 14, 1975

General Electric Company
Machinery Apparatus Operation
P.O. Box 1021
Schenectady, New York 12301

Attention: Mr. F.J. Balicki

C-WC Ref. No. A-105-35

Subject: Proposed Amendment No. 49 to MAO P.O. B-382

Gentlemen:

The enclosed amendment is executed and delivered by Seller on the express condition that:

Notwithstanding any provision of this order to the contrary, Seller reserves all rights arising out of the loss of $29,300,000 on this and other orders which is the subject of a Request for Extracontractual Relief under P.L. 85-804 filed with the Department of the Navy.

Please confirm in writing, at the time you execute the original of this amendment and return it to us, that you understand that it is executed and delivered on the above stated condition.

Very truly yours,

CURTISS-WRIGHT CORPORATION

Y.A. Wokovits
Manager, Contracts & Proposals

FAW:am
Enclosure

Affidavit of James H. Sullivan

EXHIBIT C

CURTISS-WRIGHT CORPORATION

Wood-Ridge, New Jersey 07075

General Electric Company
Machinery Apparatus Operation
Post Office Box 1021
Schenectady, New York 12301

Attention: Mr. E. Phelps

Subject: GE/MAO — C-WC Contracts — Final Payment

Dear Mr. Phelps:

Pursuant to the terms of Purchase Order No. A-595 and in consideration of the sum of two hundred sixty-three thousand seven hundred forty seven dollars ($263,747) which has been or is to be paid under the said Purchase Order to Curtiss-Wright Corporation, One Passaic Street, Wood-Ridge, New Jersey, Curtiss-Wright Corporation, upon payment of the said sum by General Electric Company, does remise, release and discharge General Electric Company and the Government, their officers, agents and employees, of and from all liabilities, obligations, claims and demands whatsoever under or arising from the said Purchase Order, except such claims as are set forth in a certain civil action entitled Curtiss-Wright Corporation, Plaintiff, versus General Electric Company, Defendant, File No. 76-794 pending in the United States District Court for the District of New Jersey.

IN WITNESS WHEREOF, this Release has been executed this twenty-third day of September, 1976.

CURTISS-WRIGHT CORPORATION

By: Richard P. Sprigle
Senior Vice President

CERTIFICATE

I, Francis E. Fallon certify that I am the Secretary of Curtiss-Wright Corporation named in the foregoing Release; that Richard P. Sprigle who signed said Release on behalf of Curtiss-Wright Corporation, is the Senior Vice President of said Corporation, that said Release was duly signed for and in behalf of said Corporation by authority of its governing body and is within the scope of its corporate powers.

s/ Francis E. Fallon
Francis E. Fallon

(Corporate Seal)

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Attachment
1. Certificate of Current Cost or Pricing Data

This Purchase Order is placed by the General Electric Company ("General Electric") pursuant to the prime contract ("Prime Contract"), indicated on the attached Purchase Order, between General Electric, acting through the Machinery Apparatus Operation (MAO), and the U.S. Government ("Government" including, but not limited to, the "Navy"), acting through the Department of the Navy, Naval Ship Systems Command ("Navy"). This order does not bind nor purport to bind the United States Government, its officers, employees or agents.

1. DEFINITIONS — As used throughout these terms and conditions, the following definitions shall apply:

Government — the United States of America

Commission — the United States Atomic Energy Commission or its duly authorized representatives

Navy — the Department of the Navy or its duly authorized representatives

Cognizant Government Agency — shall mean the United States Navy

Buyer — shall mean Machinery Apparatus Operation of the General Electric Company

Seller — the legal entity which has agreed to provide the goods or services required by this order

Purchase Order — the contract document in which, and by acknowledgement thereof, Seller agrees to provide, for consideration stated therein, the goods and services in accordance with the requirements contained or referenced therein. The terms "order," "contract," or "subcontract" shall be synonymous with the term "purchase order."

Change Order — a unilateral direction by the Buyer to the Seller to proceed with the work as changed and to report the effect on the order pursuant to the provisions of Article 6 entitled, "Changes, Extras and Substitutions."

Amendment — the contract document in which, and by acknowledgement thereof, the Seller agrees to modify the order in accord with the provisions of the amendment.

Lower-tier Subcontractor — a supplier or subcontractor, including any supporting lower-tier supplier or subcontractor, who has a subcontract or order from the Seller or any lower-tier subcontractor.

2. CONTRACT RIGHTS — This order (which term shall be deemed to include related plans, drawings, specifications, and other documents) contains the entire agreement of the parties, and no modification, alteration, waiver, or other provision which is inconsistent with or in addition to the provisions of this order shall have any force or effect unless the same shall be incorporated in the order in writing by the Buyer. Failure of Buyer to enforce any of its rights hereunder shall not constitute a waiver of such rights or of any other rights under this order.

3. DELIVERY — All Delivery requirements set forth in this order are firm. Seller agrees that delays during performance of the order which would cause delivery to extend beyond contractual delivery date(s), and which are the responsibility of Seller, must be made up by Seller at his expense through the use of whatever means are necessary including, but not limited to, overtime and additional workshifts.

Unless otherwise provided in this order, delivery shall not be made more than 45 days prior to the delivery dates specified herein. Buyer may return early deliveries at Seller's risk and expense. Seller shall comply with the delivery schedule provided in this order but shall not make material or production commitments without specific written authorization by Buyer nor in advance of such time as Seller reasonably believes necessary to meet delivery schedules except as otherwise specified in the order.

4. TAXES — Unless otherwise expressly stated on the face of this order, the price stated herein includes all applicable Federal,

State and Local taxes in effect on the date of this order but does not include any State or local sales, use or any other tax directly applicable to the completed supplies or services covered by this order from which Seller or this transaction is exempt.

5. PAYMENTS —

a. Except as otherwise provided in this order, e.g., progress payments, no payment by Buyer shall be due until thirty (30) days after (1) receipt of an acceptable invoice and appropriate evidence that Seller has met all the requirements of the order, or (2) receipt of the supplies at destination, whichever last occurs. Buyer may at his discretion make payments for partial delivery of supplies if so requested by Seller. No payment made by Buyer shall be deemed to indicate final acceptance and any payment made prior to final acceptance shall be returned by Seller at the request of Buyer if the supplies to which the payment relates are rejected.

b. Unless otherwise provided, if this order provides a discount for prompt payment, the discount period shall be calculated from the date an acceptable invoice and supporting evidence that all order requirements have been met is received or the date of receipt at destination of the supplies, whichever last occurs.

c. Seller and each assignee under an assignment in effect at the time of final payment agree as a condition precedent to final payment, that the Buyer and the Government, their respective officers, agents and employees are released from all liabilities, obligations and claims arising under or by virtue of this order. Seller further agrees that the final invoice shall constitute not less than ten percent (10%) of the total order price.

6. CHANGES, EXTRAS AND SUBSTITUTIONS —

a. Buyer may at any time, by a written Change Order issued by Buyer and without notice to the sureties, make changes, within the general scope of this order, in any one or more of the following:

1) Drawings, designs or specifications, where the supplies to be furnished are to be specifically manufactured for Buyer in accordance therewith;

2) Method of shipment or packing;

3) Place of delivery, inspection or acceptance;

4) The amount of Government furnished property;

5) The quantities or items of any repair parts lists.

If any such Change Order causes an increase or decrease in the cost of, or the time required for, performance of any part of the work under this order, or otherwise affects any other provision of this order, whether changed or not changed by any such written notice of change, an equitable adjustment shall be negotiated in the order price or delivery requirements, or both, and in such other provisions of the order as may be affected. Such adjustment shall be accomplished by a written amendment to this order signed by Buyer. No changes to this order are authorized unless made by Buyer representative designated by name herein and substantiated by a formal written amendment/change order. Changes made by Seller, unless authorized by a written amendment/change order, shall be made at the sole risk of Seller, there being no financial recourse against Buyer.

b. Any claim by Seller for adjustment under this article must be asserted within 30 days or such earlier date as may be specified by Buyer from the date of receipt by Seller of the notification of Change Orders; provided, however, that Buyer, if he decides that the facts justify such action, may receive and act upon any such claim asserted at any time prior to final payment under this order.

c. Where the cost of property made obsolete or excess as a result of a change is included in Seller's claim for adjustment. Buyer reserves the right to prescribe the manner of disposition of such property.

d. Nothing in this article shall excuse Seller from proceeding with the order as changed.

e. Buyer will not pay for additional work or extras unless such work or extras have been ordered in writing and the price therefor agreed upon. Changes made by Seller without an authorized Change Order or Amendment shall be made at the sole risk of Seller, there being no financial recourse against Buyer.

f. Seller shall not substitute other materials or accessories for those specified in the order without the written consent of Buyer.

7. LIENS — Seller agrees to delivery to Buyer the articles covered by this order free and clear of all liens, claims, and encumbrances.

8. INSPECTION —

a. All work (which term throughout this article includes without limitation raw materials, procedures and processes,

components, intermediate assemblies and end products) shall be subject to inspection and test by Buyer and the Government, to the extent practicable at all times and places including the period of manufacture, and in any event prior to acceptance. Seller is responsible for, and shall upon Buyer's request furnish evidence of, compliance with all requirements of the order; and inspection and test by Buyer or the Government of any work or approval of designs, drawings, samples, test results, procedures, processes or schedules by Buyer or the Government does not relieve Seller from any responsibility to meet the order requirements.

b. In case any work is defective in material or workmanship or otherwise not in conformity with the requirements of this order, Buyer shall have the right either to reject it (with or without instructions as to its disposition) or to require correction. Work which has been rejected or required to be corrected shall be removed, or, if permitted or required by Buyer, corrected in place by and at the expense of Seller promptly after notice, and shall not thereafter be tendered for acceptance unless the former rejection or requirement of correction is disclosed. If Seller fails promptly to remove such work which is required to be removed or promptly to replace or correct such work as specified by Buyer, Buyer either (1) may by contract or otherwise replace or correct such work and charge to Seller the cost occasioned Buyer thereby, or (2) may terminate this order for default as provided in the article of this order entitled "Default." Unless Seller corrects or replaces such work within the delivery schedule, Buyer may require the delivery of such work at a reduction in price which is equitable under the circumstances.

c. If any inspection or test is made by Buyer and/or the Government on the premises of Seller or a lower-tier subcontractor, Seller without additional charge shall provide all reasonable facilities and assistance for the safety and convenience of Buyer and/or the Government's representatives in the performance of their duties. If Buyer and/or Government inspection or test is made at a point other than the premises of Seller or a lower-tier subcontractor, it shall be at the expense of Buyer except as otherwise provided in this order; provided that, in case of rejection, Buyer shall not be liable for any reduction in value of samples used in connection with such inspection or test.

d. All inspections and tests by Buyer and/or the Government shall be performed in such a manner as not to unduly delay the work. Buyer reserves the right to charge to Seller any additional costs of Buyer's and/or the Government's inspection and test when work is not ready at the time such inspection and test is requested by Seller or when reinspection or retest is necessitated by prior rejection.

e. Acceptance or rejection of the work shall be made as promptly as practicable after delivery, except as otherwise provided in this order; but failure to inspect and accept or reject work shall neither relieve Seller from responsibility for such work as is not in accordance with the order requirements nor impose liability upon Buyer therefor. Except as otherwise provided in this order, acceptance shall be conclusive except as regards latent defects, fraud, or such gross mistakes as amount to fraud.

f. Inspection and test requirements specifically required by this order are for the convenience of Buyer and/or the Government and do not relieve Seller of his responsibility to provide a high-quality product which meets order requirements.

If during the period specified in the article of this order entitled "Warranty" any failure to meet order requirements is uncovered (including any uncovered by Buyer's and/or the Government's own tests), Seller shall be responsible in accordance with the provisions of said warranty article for correcting the condition; this requirement applies regardless of the extent of testing or inspection specifically required by this order.

g. Seller shall provide and maintain and require its lower-tier subcontractors to provide and maintain an inspection and quality control system acceptable to Buyer covering the work hereunder. Records of all inspection and quality control work by Seller and its lower-tier subcontractors shall be kept complete and available to Buyer and/or the Government during performance of this order and for such longer period as may be specified elsewhere in this order.

9. WARRANTY —

a. In addition to its obligations under other provisions of this order (including those concerning inspection and acceptance), Seller warrants material and workmanship, and that the items furnished under this order will be manufactured in accordance with the order requirements, and, if Seller is responsible for design, will meet all design requirements set forth in this order. The term of this warranty is for a period of three years after delivery or for a period of one year after the date first placed in use, whichever first expires (or in the case of standard commercial articles, one year *after delivery*).

b. Buyer shall give Seller notice of any defect or lack of conformity with order requirements within a reasonable time after discovery. Seller shall promptly thereafter (without cost to Buyer) either correct or replace such defective or non-conforming item or component thereof, and correct or replace

all appropriate drawings, procedures and manuals, or, if Buyer does not require correction or replacement of the defective or non-conforming item or component thereof, Seller, within a reasonable time after the notice shall repay such portion of the order price of the item as is equitable under the circumstances. If Seller fails to proceed with reasonable promptness to make any correction or replacement in accordance with the provisions of this article, Buyer reserves the right to cause such correction or replacement to be made and Seller agrees to reimburse Buyer for the costs incurred thereby. Unless otherwise agreed, correction or replacement of defective or non-conforming items or components thereof shall be performed subject to and in accordance with the provisions of this order. Buyer has the right to require Seller to correct in place any defective or non-conforming item or component thereof delivered under this order or to return such item or component to Seller for correction in which case Seller shall be responsible for packing and packaging charges and shipping cost (to and from Seller's plant) for item or component returned for correction. In exercising this right, Buyer will notify Seller which alternative it proposes to take. In this connection, Buyer will be reasonable in making its election in terms of its and the Government's time requirements, the relative economics of each course and the particular circumstances at the time of election, giving due regard to any reasonable requests of Seller. In the event that Seller is required to correct in place, Seller shall not be responsible for removal or reinstallation of the items or structural parts not furnished by Seller under this order. Seller shall not be required to incur costs for such correction in place in excess of an amount equal to the total price of this order. In the event that any defective item is returned by Buyer to Seller's plant for correction, Buyer shall be responsible for removing the defective item from the system and Seller shall upon completion of correction, make delivery as directed by Buyer, but shall not be obligated to incur costs in excess of the total price of this

order, plus shipping (to and from Seller's plant) and packing and packaging charges, nor shall Seller be responsible for any costs of reinstallation. However, Seller shall not be responsible for shipping costs outside the continental limits of the United States.

c. The warranty with respect to a corrected or replaced item, items or components thereof, shall be subject to the same terms as the warranty provided for in paragraph a. The original warranty for other than the corrected or replaced item, items, or components thereof shall continue until the expiration of the period prescribed in paragraph a. plus a period equal to the time elapsed between the discovery of the defect and correction or replacement of the defective item, items or components thereof.

d. Defective or non-conforming items or components thereof which Seller is required to correct or replace in accordance with the provisions of this article may be contaminated with radioactivity. Should the level of radioactivity of items or components thereof be sufficient to create by itself a "radiation area" as defined in 10 C.F.R. Sec. 20.202 in effect on the date of this order, Seller shall nevertheless promptly correct or replace such items or components as directed by Buyer. In the event Seller's costs of correction or replacement are increased solely by reason of the level of radioactivity of any such items or components thereof which exceeds the level specified in the definition of "radiation area," an equitable adjustment shall be made, and such adjustment shall be agreed to in writing. If Buyer, with respect to any such items or components thereof having a level of radioactivity sufficient to create by itself a "radiation area," elects, as provided in paragraph b. above to require payment of an equitable portion of the order price, the parties shall not consider the estimated additional costs of correcting such items or component incurred solely by reason of the level of radioactivity specified in the definition of "radiation area."

e. Approval of design, drawings, samples, test results, procedures, processes or schedules by Buyer or the Government shall not in any way limit or diminish Seller's warranties hereunder.

10. RIGHTS IN TECHNICAL DATA —

a. Definitions.

1) Technical Data, as used in this clause, means technical writing, sound recordings, pictorial reproductions, drawings, or other graphic representations and works of a technical nature, whether or not copyrighted, which are specified to be delivered pursuant to this order. The term does not include financial reports, cost analyses, and other information incidental to order administration.

2) Limited Rights means rights to use, duplicate, and disclose technical data in whole or in part, by or for the Government, with the express limitation that such data may not be released outside the Government, used, duplicated, or disclosed in whole or in part, for manufacture or procurement, except for:

(i) emergency repair or overhaul work by or for the Government where the item or process concerned is not otherwise reasonably available to enable timely performance of the work; and

(ii) release to a foreign government as the interests of the United States may require;

provided, in either case, that the release of such data shall be subject to the limitations of this paragraph 2).

3) Unlimited Rights means rights to use, duplicate or disclose technical data, in whole or in part, in any manner and for any purpose whatsoever, and to have or permit others to do so.

b. Government Rights.

1) The Government shall have unlimited rights in:

(i) technical data resulting directly from performance of experimental, developmental or research work which was specified as an element of performance in this or any other Government contract or subcontract;

(ii) technical data necessary to enable manufacture of end-items, components and modifications, or to enable the performance of processes, when the end-items, components, modifications or processes have been, or are being, developed under this or any other Government contract or subcontract in which experimental, developmental or research work is, or was specified as an element of contract performance, except technical data pertaining to items, components or processes developed at private expense (but see 2) (ii) below):

(iii) technical data constituting corrections or changes to Government-furnished data;

(iv) technical data pertaining to end-items, components or processes which was prepared for the purpose of identifying sources, size, configuration, mating and attachment

characteristics, functional characteristics and performance requirements ("form, fit and function" data, e.g., specification control drawings, catalog sheets, envelope drawings, etc.)

(v) manuals or instructional materials prepared for installation, operation, maintenance or training purposes;

(vi) other technical data which has been, or is normally furnished without restriction by the Seller or subcontractor; and

(vii) technical data listed or described in an agreement incorporated into the Schedule of this contract, which the parties have predetermined on the basis of subparagraphs (i) through (vi) above, and agreed will be furnished with unlimited rights.

2) The Government shall have limited rights in:

(i) technical data, listed or described in an agreement incorporated into the Schedule of this order, which the parties have agreed will be furnished with limited rights; and

(ii) technical data pertaining to items, components or processes developed at private expense, other than such data as may be included in the data referred to in b) 1)(i), (iii), (iv), (v). and (vi);

provided that each piece of data to which limited rights are to be asserted pursuant to 2)(i) and (ii) above is marked with the following legend in which is inserted the number of the prime contract under which

the technical data is to be delivered and the name of the Seller or subcontractor by whom the technical data was generated:

"Furnished under United States Government Contract No. ____ Shall not be either released outside the Government, or used, duplicated, or disclosed in whole or in part for manufacture or procurement, without the written permission of ____, except for: (i) emergency repair or overhaul work by or for the Government, where the item or process concerned is not otherwise reasonably available to enable timely performance of the work; or (ii) release to a foreign government, as the interests of the United States may require; provided that in either case the release, use duplication or disclosure hereof shall be subject to the foregoing limitations. This legend shall be marked on any reproduction hereof in whole or in part."

No legend shall be marked on, nor shall any limitation on rights of use be asserted as to, any data which the Seller has previously delivered to the Government without restriction. The limited rights provided for by this paragraph (b)(2) shall not impair the right of the Government to use similar or identical data acquired from other sources.

c. Material Covered by Copyright.

1) Notwithstanding the provisions of b. above, Seller agrees to and does hereby grant to the Government, and to its officers, agents, and employees acting within the scope of their official duties, a royalty-free, nonexclusive and irrevocable license throughout the world for Government purposes to publish, translate,

reproduce, deliver, perform, dispose of, and to authorize others so to do, all technical data now or hereafter covered by copyright.

2) No such copyrighted matter shall be included in technical data furnished hereunder without the written permission of the copyright owner for the Government to use such copyrighted matter in the manner described above.

3) Seller shall report to Buyer and the Government promptly and in reasonable written detail each notice or claim of copyright infringement received by Seller with respect to any technical data delivered hereunder.

d. Removal of Unauthorized Markings.

Notwithstanding any provisions of this order concerning inspection and acceptance, the Government may modify, remove, obliterate, or ignore any marking not authorized by the terms of this order on any technical data furnished hereunder, if

(i) Seller fails to respond within sixty (60) days to a written inquiry by the Government concerning the propriety of the use of the marking, or

(ii) Seller's response fails to substantiate his contention that the use of the marking is authorized, in which case the Government shall give written notice to Seller.

e. Relation to Patents.

Nothing contained in this clause shall imply a license to the Government under any patent or be construed as affecting the

scope of any license or other right otherwise granted to the Government under any patent.

f. Limitation on Charges for Data.

Seller recognizes that the Government, or a foreign government with funds derived through the Military Assistance Program or otherwise through the United States Government, may contract for property or services with respect to which the vendor may be liable to Seller for charges for the use of technical data on account of such an order. Seller further recognizes that it is the policy of the Government not to pay in connection with its contracts, or to allow to be paid in connection with contracts made with funds derived through the Military Assistance Program or otherwise through the United States Government, charges for data which the Government has a right to use and disclose to others, which is in the public domain, or which the Government has been given without restrictions upon its use and disclosure to others. This policy does not apply to reasonable reproduction, handling, mailing, and similar administrative costs incident to the furnishing of such data. In recognition of this policy, Seller agrees to participate in and make appropriate arrangements for the exclusion of such charges from such orders, or for the refund of amounts received by Seller with respect to any such charges not so excluded.

g. Acquisition of Data from Subcontractors.

1) Whenever any technical data is to be obtained from a subcontractor under this order, Seller shall use this same clause in the order without alteration, and no other clause shall be used to enlarge or diminish the Government's or the Seller's rights in that subcontractor data which is required for the Government.

2) Technical data required to be delivered by a subcontractor shall normally be delivered to the next higher-tier subcontractor.

3) Seller and subcontractor will not use their power to award lower-tier subcontracts as economic leverage to acquire rights in data from their lower-tier subcontractors for themselves.

h. Notice of Certain Limited Rights.

Seller will promptly notify Buyer in writing of the intended use in the performance of the order of any end-item, component, modification or process for which the Seller intends to furnish data with limited rights; provided, that no such notice is required with respect to standard commercial items which are manufactured by more than one source of supply or with respect to data which the parties have specified in the Schedule would be furnished with limited rights. Subcontractors will notify the next higher-tier subcontractor.

i. Data — Withholding of Payment.

If "Technical Data" (as defined in 10 a.(1) above), or any part thereof, is not delivered within the time specified by this order or is deficient upon delivery (including having restrictive markings not specifically authorized by this order), Buyer may, until such data is delivered or deficiencies are corrected, withhold payment to Seller of ten percent (10%) of the order price unless a lesser withholding is specified in the Schedule. Payments shall not be withheld nor any other action taken pursuant to this clause where Seller's failure to make timely delivery or to deliver such data without deficiencies arises out of causes beyond the control and without the fault or negligence of Seller within the meaning of the clause hereof entitled "Default."

The withholding of any amount of subsequent payment thereof to Seller shall not be construed as a waiver of any rights accruing to the Government under this order.

j. Deferred Ordering of Technical Data.

The Government shall have the right to order, at any time during the performance of this order, or within two (2) years from either acceptance of all items (other than data) to be delivered under this order or termination of this order, whichever is later, any data called for in the Schedule of this order, and Seller shall promptly prepare and deliver such data as is ordered. However, Seller shall be relieved of the obligation to furnish data pertaining to an item obtained from a subcontractor upon the expiration of two (2) years from the date he accepts the item. When the data is delivered, payment shall be made, by equitable adjustment or otherwise, for converting the data into the prescribed form, reproducing it, and preparing it for delivery. Such payment shall not be included in the application of any incentive pricing formula.

k. Seller Identification of Technical Data.

Seller shall identify each item of "Technical Data" with the number of this order and the number of the prime contract under which this order is placed. Buyer agrees that it will not use "Technical Data" supplied by Seller pursuant to this order for other than Governmental purposes. Delivery of such technical data to the Government shall be effected through Buyer.

11. PATENTS — PROVISIONS AND RIGHTS —

a. Patent Provisions

1. Whenever any invention or discovery is made or conceived by Seller or its employees in the course of,

or under this order, Seller shall furnish the Commission with complete information thereon; and the Commission shall have the sole power to determine whether or not and where a patent application shall be filed and to determine the disposition of the title to and rights under any application or patent that may result. The judgment of the Commission on these matters shall be accepted as final; and Seller, for itself and for its employees, agrees that the inventor or inventors will execute all documents and do all things necessary or proper to carry out the judgment of the Commission.

2. No claim for pecuniary award or compensation under the provisions of the Atomic Energy Acts of 1946 and 1954 shall be asserted by Seller or its employees with respect to any invention or discovery made or conceived in the course of, or under this order.

3. Except as otherwise authorized in writing by the Commission, Seller will obtain patent agreements to effectuate the purposes of paragraphs 1 and 2 of this article from all persons who perform any part of the work under this order, except such clerical and manual labor personnel as will not have access to technical data.

4. Except as otherwise authorized in writing by the Commission, Seller will insert in all lower-tier orders provisions making this article applicable to the lower-tier Seller and its employees.

b. Patent Rights

Notwithstanding the disposition by the Commission, the Government shall retain the Patent Rights in Section IX,

paragraph 9-107.5(a) of the Armed Services Procurement Regulations as in effect on the date of this order.

c. It is recognized that during the course of the work under this order, Seller or its employees may from time to time desire to publish, within the limits of security requirements, information regarding scientific or technical developments made or conceived in the course of or under this order. In order that public disclosure of such information will not adversely affect the patent interests of the Government or the Seller, prior approval for release and publication shall be secured from the Buyer prior to any such release or publication.

12. PATENT INDEMNITY — Seller agrees to indemnify Buyer and the Government, their officers, agents, servants and employees against liability of any kind (including costs and expenses incurred) for the infringement of any United States Letters Patent (not including liability arising pursuant to Section 183, Title 35 (1952), U.S. Code, prior to the issuance of Letters Patent) occurring in the performance of this order or arising by reason of the use or disposal by or for the account of the Government of items manufactured or supplied under this order, except, however, any infringement necessarily resulting from Seller's compliance with written specifications or provisions for other than standard parts or components manufactured or supplied by Seller or resulting from specific written instructions given by the Government or Buyer for the purpose of directing a manner of performance of the order not normally utilized by Seller.

13. NOTICE AND ASSISTANCE REGARDING PATENT INFRINGEMENT

a. Seller shall report to Buyer, promptly and in reasonable written detail, each notice or claim of patent infringement based on the performance of this order of which Seller has knowledge.

b. In the event of any suit against Buyer, or the Government, or any claim against Buyer or the Government made before suit has been instituted, on account of any alleged patent infringement arising out of the performance of this order or out of the use of any supplies furnished or work or services performed hereunder, Seller shall furnish to Buyer or the Government upon request, all evidence and information in possession of Seller pertaining to such suit or claim. Such evidence and information shall be furnished at the expense of the Government except in those cases in which Seller has agreed to indemnify Buyer and the Government against the claim being asserted.

14. FURNISHED INFORMATION — Plans, drawings, specifications, designs, photographs and any other engineering and manufacturing information furnished by Buyer shall remain Buyer or Government property, as the case may be, shall be reproduced only as authorized in writing by Buyer, shall be used only for performance of the work under this order, and shall be returned to Buyer upon request, which request may be made during such performance or at termination or completion of the order, and Seller shall thereafter make no further use of any information derived therefrom without prior written consent of Buyer or the Government.

15. TRANSMISSION ABROAD OF EQUIPMENT OR TECHNICAL DATA RELATING TO NUCLEAR PROPULSION OF NAVAL SHIPS —

a. The supplies specified to be delivered under this order relate to Nuclear Propulsion of Naval Ships.

b. Except with the prior written consent of Buyer or the Government or its designated representative, Seller shall not, at any time during or after the performance of this order, transmit

or authorize the transmittal of any equipment or technical data, as defined in paragraph (c) below, (1) outside the United States or (2) irrespective of location, (i) to any foreign national not working on this order or on a lower-tier order hereunder, (ii) to any foreign organization (including foreign subsidiaries and affiliates of Seller), (iii) to any foreign government, or (iv) to any international organization.

c. As used in the article, the following terms shall have the following definitions:

1. 'United States' means the States, the District of Columbia, Puerto Rico, American Samoa, the Canal Zone, the Virgin Islands, Guam and any areas subject to the complete sovereignty of the United States;

2. 'equipment' means all supplies of the kind specified to be delivered under this order, all component parts thereof, and all models of such supplies and component parts; but 'equipment' does not include standard commercial supplies and component parts and models thereof.

3. 'technical data' means all professional, scientific, or technical information and data produced or prepared for the performance of this order or on or for the operation, maintenance, evaluation, or testing of any order item, whether or not the information and data were specified to be delivered under this order, including, without limitation, all writings, sound recordings, pictorial reproductions, and drawings or other graphical representations; but 'technical data' does not include such information and data on standard commercial supplies and component parts to the extent that the information and data do not relate

to the use, operation, maintenance, evaluation, and testing of such supplies and component parts in or in connection with any item, or component part thereof, specified to be delivered under this order.

d. Seller agrees to insert in all sub-tier orders under this order provisions which shall conform substantially to the language of this article, including this paragraph d.

e. Notwithstanding any other provisions of this article, this article shall not apply (1) where the transmittal or authorization for the transmittal of equipment or technical data is to be made pursuant to a contract or agreement to which the United States is a party, and (2) where the transmittal is to be of equipment or technical data which Buyer or the Government or its designated representative has declared in writing to Seller to be thereafter exempt from this article.

16. CONTROL OF VISITORS — Except with the prior written consent of Buyer, and the cognizant Contracting Officer or his designated representative, Seller shall not permit any visitor to a Seller's plant, office or facility to view or examine equipment specified to be delivered under this order, or major subassemblies of such equipment, or to obtain information or data concerning such equipment. As used in this article, "visitor" means any person who visits Seller's plant, office or facility and who does not represent either Seller, Buyer, or the Government in the performance of this order. Seller agrees to insert this article including this sentence in all subcontracts covering major subassemblies.

17. PUBLIC RELEASE OF INFORMATION — Information, data, photographs, sketches, advertising, etc., relating to the work under this order, which Seller desires to release or publish, shall be submitted to Buyer for approval eight (8) weeks prior to

the desired release date. As part of the approval request, Seller shall identify the specific media to be used as well as other pertinent details of the proposed release. All releases, regardless of tier of supplier, must have the prior approval of Buyer. Seller shall include all provisions of this article including this sentence in all subcontracts under this order.

18. LOWER-TIER SELLER COST AND PRICING DATA —

a. Seller shall require lower-tier Sellers hereunder to submit cost or pricing data under the following circumstances: (i) prior to award of any cost-reimbursement type, incentive, or price redeterminable subcontract; (ii) prior to the award of any subcontract the price of which is expected to exceed $100,000; (iii) prior to the pricing of any subcontract change or other modification for which the price adjustment is expected to exceed $100,000; except in the case of (ii) or (iii) where the price is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, or prices set by law or regulation.

b. Seller shall require lower-tier Sellers to certify, in the form set forth on Attachment I, that to the best of their knowledge and belief, the cost and pricing data submitted under a. above is accurate, complete and current as of the date of execution, which date shall be as close as possible to the date of agreement on the negotiated price of the order.

c. Seller shall insert the substance of this clause including this paragraph c. in each of his cost-reimbursement type, price redeterminable, or incentive subcontracts hereunder, and in any other subcontract hereunder which exceeds $100,000 except where the price thereof is based on adequate price competition, established catalog or market prices of commercial items sold in

substantial quantities to the general public, or prices set by law regulation. In each such excepted subcontract hereunder in excess of $100,000, Seller shall insert the substance of the following clause:

> Lower-tier Seller Cost and Pricing Data — Price Adjustments
>
> a) Paragraphs b) and c) of this clause shall become operative only with respect to any change or other modification made pursuant to one or more provisions of this order which involves a price adjustment in excess of $100,000. The requirements of this clause shall be limited to such price adjustments.
>
> b) Seller shall require lower-tier Sellers hereunder to submit cost or pricing data under the following circumstances; (i) prior to award of any cost-reimbursement type, incentive or price redeterminable subcontract; (ii) prior to award of any subcontract, the price of which is expected to exceed $100,000; (iii) prior to the pricing of any subcontract change or other modification for which the price adjustment is expected to exceed $100,000; except, in the case of (ii) or (iii), where the price is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, or prices set by law or regulation.
>
> c) Seller shall require lower-tier Sellers to certify, in the form set forth on Attachment I, that to the best of their knowledge and belief the cost and pricing data submitted under b) above is accurate, complete, and current as of the date of execution, which date shall be as close as possible to the date of agreement on the negotiated price of the order.

d) Seller shall insert the substance of this clause including this paragraph d) in each subcontract hereunder which exceeds $100,000.

19. AUDIT AND RECORDS —

(a) The Seller shall maintain books, records, documents and other evidence and accounting procedures and practices, sufficient to reflect properly all direct and indirect costs of whatever nature claimed to have been incurred and anticipated to be incurred for the performance of this order. The foregoing constitute "records" for the purpose of this article.

(b) The Seller's plants, or such part thereof as may be engaged in the performance of this order, and his records shall be subject at all reasonable times to inspection and audit by the Contracting Officer of the Government prime contract or his duly authorized Government representative. In addition, for purposes of verifying that cost or pricing data submitted, in conjunction with the negotiation of this order or any order change or other modification involving an amount in excess of $10,000, were accurate, complete and current, the Contracting Officer of the Government prime contract or his duly authorized Government representatives, shall — until the expiration of three years from the date of final payment under this order — have the right to examine those books, records, documents, papers and other supporting data which involve transactions related to this order or which will permit adequate evaluation of the cost or pricing data submitted, along with the computations and projections used therein.

(c) The Seller shall preserve and make available his records (i) until the expiration of three years from the date of final payment under this order, and (ii) for such longer period, if any,

as is required by applicable statute, or by other clauses of this order, or by (A) and (B) below.

(A) If this order is completely or partially terminated, the records relating to the work terminated shall be preserved and made available for a period of three years from the date of any resulting final settlement.

(B) Records which relate to litigation or the settlement of claims arising out of the performance of the Government prime contract, or of this order, shall be retained until such litigation or claims have been disposed of.

(d)(1) The Seller shall insert this article, including the whole of this paragraph (d), in each subcontract hereunder that is not firm fixed-price or fixed-price with escalation. When so inserted, changes shall be made to designate the higher-tier subcontractor of the level involved in place of the Seller and to change the amount in paragraph (b) above to $100,000.

(2) The Seller shall insert the following clause in each firm fixed-price or fixed-price with escalation subcontract hereunder which when entered into exceeds $100,000, except those subcontracts covered by subparagraph (3) below.

AUDIT

(a) For purposes of verifying that certified cost or pricing data submitted in conjunction with the negotiation of this subcontract or any contract change or other modification involving an amount in excess of $100,000 were accurate, complete, and current, the Contracting Officer of the Government prime contract, or his duty authorized Government

representatives, shall — until the expiration of three years from the date of final payment under this subcontract — have the right to examine those books, records, documents, papers and other supporting data which involve transactions related to this subcontract or which will permit adequate evaluation of the cost or pricing data submitted, along with the computations and projections used therein.

(b) The Subcontractor agrees to insert this article including this paragraph (b) in all subcontracts hereunder which when entered into exceed $100,000 unless the price is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, or prices set by law or regulation.

(3) The Seller shall insert the following clause in each firm fixed-price or fixed-price with escalation subcontract hereunder which when entered into exceeds $100,000 where the price is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, or prices set by law or regulation.

AUDIT — PRICE ADJUSTMENTS

(a) This clause shall become operative only with respect to any change or other modification of this subcontract, which involves a price adjustment in excess of $100,000 unless the price adjustment is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, or prices set by law or regulation.

(b) For purposes of verifying that any certified cost or pricing data submitted in conjunction with a contract change or

other modification were accurate, complete, and current, the Contracting Officer of the Government prime contract, or his duly authorized Government representatives, shall — until the expiration of three years from the date of final payment under this subcontract — have the right to examine those books, records, documents, papers and other supporting data which involve transactions related to this subcontract or which will permit adequate evaluation of the cost of pricing data submitted, along with the computations and projections used therein.

(c) The Subcontractor agrees to insert this article including this paragraph (c) in all subcontracts hereunder which when entered into exceed $100,000.

20. PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA

a. If Buyer determines that any price, including profit or fee, negotiated in connection with this order was increased by any significant sums because Seller, or any lower-tier Seller in connection with a subcontract covered by b. below, furnished incomplete or inaccurate cost or pricing data or data not current as certified in Seller's Certificate of Current Cost or Pricing Data, then such price shall be reduced accordingly and the order shall be modified in writing to reflect such adjustment.

b. Seller agrees to insert the substance of paragraphs a. and b. of this article in each of his cost-reimbursement type, price redeterminable, or incentive subcontracts hereunder, and in any other subcontract hereunder in excess of $100,000, unless the price is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, or prices set by law or regulation. In each such excepted subcontract hereunder which exceeds $100,000, Seller shall insert the substance of the following article.

Price Reduction for Defective Cost or Pricing Data — Price Adjustments

a. This article shall become operative only with respect to any change or other modification made pursuant to one or more provisions of this order which involves a price adjustment in excess of $100,000, except where the price is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, or prices set by law or regulation. The right to price reduction under this article shall be limited to such price adjustments.

b. If Buyer determines that any price, including profit or fee, negotiated in connection with any price adjustment within the purview of paragraph a. above was increased by any significant sum because Seller or any of his lower-tier Sellers in connection with a subcontract covered by paragraph c. below, furnished incomplete or inaccurate cost or pricing data, or data not current as of the date of execution of Seller's Certificate of Current Cost or Pricing Data, then such price shall be reduced accordingly and the order shall be modified in writing to reflect such adjustment.

c. Seller agrees to insert the substance of this article in each subcontract hereunder which exceeds $100,000.

c. If the Government or any of its duly authorized representatives determines that the price, including profit, of this order or any subcontract under this order was increased by any sum because Seller or any of his lower-tier Sellers required to furnish a Certificate of Current Cost or Pricing Data, furnished incomplete or inaccurate cost or pricing data or data not current

as of the date of execution of the Certificate, then the price of this order shall be reduced by the amount by which the price of Buyer's prime contract is reduced and Seller shall reimburse Buyer accordingly. This obligation shall survive this order.

21. TITLE — Title to all materials and supplies purchased under this order shall vest in the Government whenever title passes from Seller.

22. APPLICABLE LAWS — This order shall be governed in all respects by the laws of the State of New York.

23. PROPRIETARY INFORMATION — Any knowledge or information which Seller shall have disclosed or may hereafter disclose to Buyer incident to the placing and filling of this order shall not, unless otherwise specifically agreed upon in writing by Buyer, be deemed to be Seller proprietary information, and accordingly shall be acquired free from any restrictions (other than restrictions which may result from a claim for patent infringement).

24. NOTICE OF LABOR DISPUTES — Whenever an actual or potential labor dispute is delaying or threatens to delay the performance of the work Seller shall immediately notify Buyer in writing. Such notice shall include all relevant information concerning the dispute and its background.

25. PRIORITIES, ALLOCATIONS AND ALLOTMENTS — Seller shall follow the provisions of DMS Regulation 1 and all other applicable regulations and orders of the Business and Defense Services Administration in obtaining controlled materials and other products and materials needed to fill this order.

26. ASSIGNMENT —

a. Neither this order nor any interest therein nor claim thereunder shall be assigned or transferred by Seller, except as expressly authorized in writing by Buyer.

b. In no event shall copies of this order or of any plans, specifications, or other similar documents relating to work under this order, if marked "Top Secret," "Secret," or "Confidential," be furnished to any assignee of any claim arising under this order or to any other person not entitled to receive the same. However, a copy of any part or all of this order so marked may be furnished or any information contained therein may be disclosed, to such assignee upon the prior written authorization of Buyer.

c. This order or any and all rights thereunder may be assigned by Buyer to the Government or any designee of the Government, provided that written notice thereof is given to Seller.

27. SUBCONTRACTING — Seller agrees to perform this order in accordance with the Subcontracting Program set forth in the order except as hereafter provided.

a. If Seller wishes to make any additions to or substitutions in its Subcontract Program, Seller shall notify Buyer in writing reasonably in advance and shall submit justification in sufficient detail to permit evaluation of the proposed change. Seller shall not make any additions to or substitutions to the Subcontract Program without the prior written consent of Buyer.

b. In the event that no Subcontract Program is included in this order, and subsequent to contract award Seller decides to subcontract all or a substantial portion of the work on any

deliverable item(s) to be furnished under this order. Seller shall not do so without the prior written consent of Buyer.

c. The provisions of this article do not apply to purchases of raw materials, standard commercial supplies, qualified products list items, and hardware items.

28. SET-OFF — Buyer shall be entitled at all times to set-off against any amount payable by Buyer in connection with this order, any amount owed by Seller to Buyer arising from transactions relating to Buyer's order.

29. PERMITS — Except as otherwise directed by Buyer, Seller shall procure all necessary permits or licenses and abide by all applicable laws, regulations, and ordinances of the United States and of the State, territory, and political subdivision in which the work under this order is performed.

30. SPECIAL MATERIALS — Special measures as delineated in the order shall be taken by Seller for the protection of and accounting for any source, special nuclear and special reactor materials supplied to it, in accordance with regulations and requirements of the cognizant Government agency and Buyer.

31. DEFAULT —

a. Buyer may, subject to the provisions of paragraph c. below, by written Notice of Default to Seller, terminate the whole or any part of this order in any one of the following circumstances: (1) if Seller fails to make delivery of the supplies or to perform the services within the time specified herein or any extension thereof, or (2) if Seller fails to perform any of the other provisions of this order, or so fails to make progress as to endanger performance of this order in accordance with its terms, and in either of these two circumstances does not cure such

failure within a period of ten (10) days (or such longer period as Buyer may authorize in writing) after receipt of formal notice from Buyer specifying such failure.

b. In the event Buyer terminates this order in whole or in part as provided in paragraph a. of this article, Buyer may procure, upon such terms and in such manner as Buyer may deem appropriate, supplies or services similar to those so terminated, and Seller shall be liable to Buyer for any excess costs for such similar supplies or services; provided, however, that Seller shall continue the performance of this order to the extent not terminated under the provisions of this article.

c. Except with respect to defaults of lower-tier subcontractors, Seller shall not be liable for any excess costs if the failure to perform the order arises out of causes beyond the control and without the fault or negligence of Seller. Such causes may include, but are not restricted to, acts of God or of the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather but in every case the failure to perform must be beyond the control and without the fault or negligence of Seller. If the failure to perform is caused by the default of a lower-tier subcontractor, and if such default arises out of causes beyond the control of both Seller and the lower-tier subcontractor, and without the fault or negligence of either of them, Seller shall not be liable for any excess costs for failure to perform, unless the supplies or services to be furnished by the lower-tier subcontractor were obtainable from other sources in sufficient time to permit Seller to meet the required delivery schedule.

d. If this order is terminated as provided in paragraph a. of this article, Buyer, in addition to any other rights provided in this article, may require Seller to transfer title and deliver to

Buyer, in the manner and to the extent directed by Buyer, (1) any completed supplies, and (2) such partially completed supplies and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights (hereinafter called "manufacturing materials") as Seller has specifically produced or specifically acquired for the performance of such part of this order as has been terminated; and Seller shall, upon direction of Buyer, protect and preserve property in possession of Seller in which Buyer or Government has an interest. Payment for completed supplies delivered to and accepted by Buyer shall be at the order price. Payment for manufacturing materials delivered to and accepted by Buyer and for the protection and preservation of property shall be in an amount agreed upon by Seller and Buyer.

e. If, after notice of termination of this order under the provisions of paragraph a. of this article, it is determined that the failure to perform this order is due to causes beyond the control and without the fault or negligence of Seller or lower-tier subcontractor pursuant to the provisions of paragraph b. of this article, such Notice of Default shall be deemed to have been issued pursuant to the article of this order entitled, "Termination," and the rights and obligations of the parties hereto shall, in such event, be governed by such article.

f. The rights and remedies of the Buyer provided in this article shall not be exclusive and are in addition to any other rights and remedies provided by law or under this order.

32. SUSPENSION OF WORK FOR THE CONVENIENCE OF THE BUYER — Buyer may by written notice, direct Seller to suspend all or any part of the work for such period of time as may be determined by Buyer to be necessary or desirable for its convenience. If such suspension unreasonably delays the

progress of the work and causes additional expense or loss to Seller in the performance of the work, not due to the fault or negligence of Seller, an equitable adjustment in the price and the time for performance shall be made by agreement of the parties, and the order shall be modified in writing accordingly; provided, however, that any claim by Seller for an adjustment hereunder must be asserted within thirty (30) days from the date of a start order for resumption of work.

33. WORK ON BUYER, GOVERNMENT OR OTHER PREMISES —

a. As to the work to be done, or service to be performed by Seller on Buyer premises, Government premises, or the premises of other Buyer subcontractors, Seller assumes entire responsibility and liability for losses, expenses, damages, demands, and claims in connection with or arising out of any injury or alleged injury (including death) or damage or alleged damage to property, sustained or alleged to have been sustained in connection with or to have arisen out of performance of the work. Seller will indemnify and save harmless the Government and Buyer from and against any and all claims, demand, actions, causes of action, suits, damages, expenses (including attorney's fees) and liabilities whatsoever resulting from or arising in any manner on account of or by reason of any injury to or death of any person or any damage to or loss of property which may occur or be alleged to have occurred as a result of or in connection with the performance of this order. Nothing in the foregoing shall be construed to require Seller to indemnify and save harmless the Government and the Buyer from any liability arising out of or resulting from a nuclear incident.

b. Seller agrees to comply with all applicable laws, rules and regulations with respect to workmen's compensation or occupational disease, or withholding and payment of social

security and federal income taxes, and to obtain similar agreements from all its subcontractors; and Seller further agrees to indemnify Buyer and the Government, against and to save and hold harmless Buyer and the Government from any and all liability and expense with respect to claims against Buyer or the Government which may result from the failure or alleged failure of Seller or of any of its subcontractors to comply therewith.

34. FAIR LABOR STANDARDS ACT — Seller will comply with the requirements of the Fair Labor Standards Act of 1938 (29 U.S. Code 201-219), as amended.

35. ANTI-KICKBACK ACT — Seller will comply with the requirements of the Anti-kickback Act of 1946 as amended.

36. USE OF GOVERNMENT PROPERTY, SPECIAL TOOLING, OR SPECIAL TEST EQUIPMENT — Use of Government property, special tooling, or special test equipment on this order by Seller is not authorized; and Seller agrees to execute this order without making use on any basis of Government-owned land, buildings, machine tools, equipment, special tooling, special test equipment, or other facilities without the prior approval of the Buyer.

37. PREPRODUCTION COSTS — Seller agrees that all preproduction and start-up costs and other non-recurring charges that Seller is absorbing under this order shall not be charged to Buyer, the Government or any other Naval Reactors prime contractor in any future procurement.

38. COMPLIANCE WITH ARMED SERVICES PROCUREMENT REGULATIONS — The following clauses a. through u., provisions of the Armed Services Procurement Regulations, as in effect on the date of this order, apply. In each

case, the word "Contractor" shall mean "Seller," the word "Contract" shall mean "Order," and the words "Contracting Officer," shall mean "Buyer,"

a. Buy American Act — ASPR 6-104.5

b. Convict Labor — ASPR 12-203.

c. Convenant Against Contingent Fees — ASPR 7-103.20.

d. Examination of Records — ASPR 7-104.15 except that the Department of Navy or any of its duly authorized Government representatives shall have the same rights provided the Comptroller General of the United States or any of the Comptroller General's duly authorized representatives.

e. Excess Profit — ASPR 7-104.11(a).

f. Filing of Patent Applications — ASPR 9-106.

g. Government Property — If Government property is to be furnished to the Seller under this order, the clauses set forth in the Armed Services Procurement Regulations, Section XIII, paragraphs 13-702(a) and 13-702(c) as in effect or the date of this order shall apply except that where appropriate for changes, Article 6, titled — "Changes, Extras, and Substitutions" of these terms and conditions shall apply.

h. Interest — The article set forth in the Armed Services Procurement Regulations, Appendix E, paragraph 620 applies. Where necessary to make the above article applicable to this order the term "Government" shall be deemed to refer to "Buyer."

i. Equal Opportunity — ASPR 12-802(a) modified as follows:

Delete references to "the President's Committee on Equal Employment Opportunity, Executive Order 10925 of March 6, 1961, as amended, and Section 303 of Executive Order No. 10925 of March 6, 1961, as amended" and substitute therefor "the Secretary of Labor, Executive Order No. 11245 of September 24, 1965, and Section 204 of Executive Order 11246 of September 24, 1965," respectively.

In accordance with regulations of the Secretary of Labor, the rules, regulations, orders, instructions, designations and other directives issued by the President's Committee on Equal Employment Opportunity and those issued by the heads of various departments or agencies under or pursuant to any of the Executive Orders superseded by Executive Order 11246, shall, to the extent that they are not inconsistent with Executive Order 11246, remain in full force and effect unless and until revoked or superseded by appropriated authority. Reference in such directives to provisions of the superseded orders shall be deemed to be references to the comparable provisions of Executive Order 11246.

j. Renegotiation — ASPR 7-103.13(a).

k. Responsibility for Supplies — ASPR 7-103.6.

l. Military Security Requirement — ASPR 7-104.12(a).

m. Special Tooling and Special Test Equipment

(1) Except as to special tooling and special test equipment specified to be delivered to Buyer as an end item under this order, the clauses set forth in Section XIII,

paragraphs 13-704 and 13-705, respectively, of the Armed Services Procurement Regulation shall apply to all special tooling or special test equipment, (as defined in the ASPR clause) acquired or manufactured by Seller for use in the performance of this order, full cost of which is charged to this order.

(2) Seller agrees that, in placing any orders, under this order which involve the use of special tooling or special test equipment, the full cost of which is charged to each order, it will include therein appropriate provisions to obtain rights comparable to those granted Buyer and the Government by this article, and agrees that it will exercise such rights for the benefit of Buyer and the Government, as Buyer may direct.

n. Termination — Without limiting Buyer's right to terminate this order for default of Seller as provided in the article titled, "Default," Buyer may terminate all or any part of the work under this order in accordance with the provisions of the subcontract termination article set forth in paragraph 8-706 of the Armed Services Procurement Regulation in effect on the date of this order except that the time limit for submittal of termination claims as specified in paragraph (c) of such clause is changed to read, "four (4) months from the effective date of termination or such further period as may be mutually agreed upon."

o. Utilization of Concerns in Labor Surplus Areas — ASPR 1-805.3(a).

p. Labor Surplus Area Subcontracting Program — ASPR 1-803(b).

q. Utilization of Small Business — ASPR 1-707.3(a).

r. Small Business Subcontracting Program — ASPR 1-707.3(b).

s. Walsh-Healey Public Contract Act — ASPR 12-605.

t. Contract Work Hours Standards Act — Overtime Compensation — ASPR 12-303.

u. Duty-Free Entry — Canadian Supplies — ASPR 6.605.2.

39. COST SUPPORT AND CERTIFICATION RELATIVE TO AMENDMENTS

a. When required by Buyer, Seller shall furnish certified cost and pricing data for any proposed amendment to this order with a price impact of $10,000. or more as indicated below:

1. A properly executed DD Form 1107, Change Order Price Analysis, shall be submitted in support of proposals made pursuant to an inquiry to Seller involving technical changes or the "Changes" Article of this order.

2. A properly executed DD Form 633, Contract Pricing Proposal shall be submitted in support of proposals for the addition of line items or increases in the quantity of current line items in this order.

Upon completion of negotiations relative to the proposals described in a. above, Seller shall submit an updated DD Form 1107 or DD Form 633, as appropriate, and a Certificate of Current Cost or Pricing Data (in the form set forth in Attachment No. 1 hereto) in support thereof.

Affidavit of James H. Sullivan

40. ORDER OF PRECEDENCE — In the event of any inconsistency between any provisions of this order, the order of precedence shall be as follows: the purchase order, the Terms and Conditions of Purchase, the Administrative requirements, the Equipment Specification and any specifications or drawings referenced therein.

Affidavit of James H. Sullivan

ATTACHMENT NO. 1

CERTIFICATE OF CURRENT COST OF PRICING DATA

This is to certify that, to the best of my knowledge and belief, cost or pricing data as defined in ASPR 3-807.3(c) submitted, either actually or by specific identification in writing (see ASPR 3-807.3(f)), to the Buyer or his representative in support of _____* are accurate, complete, and current as of _____**.
day month year

Firm: _____

Name: _____

Title: _____

_____
Date of Execution***

*Describe the proposal, quotation, request for price adjustment or other submission involved, giving appropriate identifying number (e.g., RFP NO.____).

**This date shall be the date when the price negotiations were concluded and the purchase order price was agreed to. The responsibility of the Seller is not limited by the personal knowledge of the Seller's negotiator if the Seller had information reasonably available (see ASPR 3-807.5(a)) at the time of agreement, showing that the negotiated price is not based on accurate, complete and current data.

***This date should be as close as practicable to the date when the price negotiations were concluded and the purchase order price was agreed to.

AFFIDAVIT OF F.J. BALICKI, FILED MAY 31, 1977 WITH ATTACHMENTS

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 76-794

[TITLE OMITTED]

STATE OF NEW YORK)
SS
COUNTY OF SCHENECTADY)

F. J. BALICKI, being duly sworn, deposes and states:

1. I have been an employee of the General Electric Company ("G.E.") since 1965 and am presently the manager of Procurement Operations of G.E.s Machinery Apparatus Operation ("M.A.O.") and have been since 1974. I submit this Affidavit in support of G.E.'s Cross-Motion for Partial Summary Judgment and Opposition to the Motion of Plaintiff Curtiss-Wright Corporation ("Curtiss-Wright") for Partial Summary Judgment and to Strike Certain Defenses and to Dismiss the Counterclaim. I have personal knowledge of the matters set forth herein.

2. Between April 12, 1968, and September 29, 1972, G.E. and Curtiss-Wright entered into a series of 21 purchase orders by which Curtiss-Wright agreed to produce, for delivery to the United States Navy ("Navy"), certain components used in the propulsion systems of nuclear submarines and surface vessels. These purchase orders were designated with the following numbers: A-550, A-595, A-641, A-642, A-656, A-661, A-675, A-113, B-384, B-382, B-425, B-423, B-412, B-410, B-428, B-429, B-433, B-442, B-452, B-451, and B-478.

3. Incorporated by reference within each of the purchase orders listed in Paragraph 2 above is Article 5c of the "Terms & Conditions of Purchase" that are appended as Exhibit D to the Affidavit of James H. Sullivan filed by Curtiss-Wright in this action. Article 5c provides in its entirety:

> "Seller [Curtiss-Wright] and each assignee under an assignment in effect at the time of final payment agree as a condition precedent to final payment, that the Buyer and the Government, their respective officers, agents and employees are released from all liabilities, obligations and claims arising under or by virtue of this order. Seller further agrees that the final invoice shall constitute not less than 10 percent (10%) of the total order price."

4. In July 1968, I was the Senior Contract Negotiator with primary responsibility on behalf of G.E. for the negotiation of A-595 with Curtiss-Wright. A-595 was the second of the 21 purchase orders entered into between G.E. and Curtiss-Wright.

5. During the negotiations for A-595, the negotiators for Curtiss-Wright sought to exclude from this purchase order a provision for the withholding of money until final payment. Although G.E. made some concessions on other matters during the negotiations for this purchase order, the provision for withholding was not excluded, and Curtiss-Wright agreed to its inclusion. As stated in Paragraph 3 above, a provision for withholding has been agreed to by Curtiss-Wright in each and every purchase order involved in this action, including those entered into subsequent to A-595.

6. I would like to explain briefly the process by which final payments may be made under each of the purchase orders listed

in Paragraph 2 above. Each of these purchase orders is a "maximum-price-redeterminable-downward-only" contract. Accordingly, before the amount of final payment can be calculated, a final fixed price must be established through "redetermination." The contracts require that this be accomplished by means of a formal amendment to the purchase order, derived as a result of negotiation between G.E. and Curtiss-Wright. Before this amendment is formally executed by Curtiss-Wright, however, it must be reviewed and approved by the Navy because, under the terms of the contracts between the Navy and G.E. and the purchase orders between G.E. and Curtiss-Wright, as well as the Armed Services Procurement Regulations, the Navy must approve all amendments which establish a firm fixed price by redetermination. Therefore, without Navy approval the amendment necessary to make final payment cannot be issued.

7. With respect to purchase orders B-382, B-384, B-410, B-412, and B-425 — the purchase orders which are the subject of the Seventeenth Count of the Amendment To And Supplemental Complaint — G.E. and Curtiss-Wright have agreed to, and the Navy has approved, an amount representing the redetermined firm fixed price, less progress and liquidation payments. This amount is $3,673,584.00. However, when Curtiss-Wright executed the final amendment to each purchase order that would reflect this agreement, it purported to do so only "conditionally," as reflected in the letter which is appended as Exhibit B to the Sullivan Affidavit. Similarly, Curtiss-Wright submitted invoices, for each of these purchase orders, containing a statement that, "[n]otwithstanding any provision of this order to the contrary, [Curtiss-Wright] reserves all rights arising out of the loss . . . on this and other orders which is the subject of a Request for Extraordinary Contractual Relief under P.L. 85-804 filed with the Department of the Navy."

8. Because the actions of Curtiss-Wright described in Paragraph 7 above were inconsistent with Article 5c of the "Terms and Conditions of Purchase," the invoices for these purchase orders were returned to Curtiss-Wright. Subsequently, these invoices were again submitted by Curtiss-Wright and accompanied by a "qualified release" in which Curtiss-Wright purported to release G.E. and the Government from all claims except those which are the subject of this action. A copy of this qualified release has been appended as Exhibit C to the Sullivan Affidavit.

9. With respect to purchase orders A-550, A-595, A-642, B-423, B-429, B-433, and B-442 — the purchase orders which are the subject of the Eighteenth Count of the Amendment To And Supplemental Complaint — the processing of the "Final Price Redetermination Amendments" has not been completed because of Curtiss-Wright's representation that these amendments would similarly be executed "conditionally." Indeed, Curtiss-Wright has submitted invoices for these purchase orders containing the "qualified release" referred to in Paragraph 8 above. Since, as of this writing, G.E.'s recommendations with respect to a redetermined firm fixed price have not been submitted to, or acted upon by, the Navy as to three of the orders (A-550, A-595, and A-642), the cumulative redetermined firm fixed price for the orders which are the subject of the Eighteenth Count of the Amendment To And Supplemental Complaint may not prove to be exactly $4,704,952.00, as Curtiss-Wright alleges. As stated previously, the approval of the Navy is necessary before the final amendment fixing the final price of these purchase orders may be executed between G.E. and Curtiss-Wright.

10. With respect to A-550 and A-595, wholly apart from Curtiss-Wright's failure to comply with Article 5c of the "Terms and Conditions of Purchase," there are additional items to be delivered by Curtiss-Wright before final payments may be made.

These items are not the large components that were called for by the purchase orders themselves, but include hardware and software which relate to the large components.

11. Although M.A.O. considers that it is the Navy's lawful prerogative to decline to approve any amendment authorizing final payment to Curtiss-Wright, as long as Curtiss-Wright seeks to deviate from the provisions of Article 5c, nonetheless, on three occasions, representatives of M.A.O. have recommended to the Navy that perhaps, in this instance, it should waive strict compliance with Article 5c. On each occasion the Navy has disapproved that recommendation. The letters containing the responses to these recommendations are self-explanatory and are appended hereto as Exhibits A, B, and C.

12. G.E.'s Counterclaim and the portion of its Answer containing its set-off were reviewed by the Navy prior to their filing in this action. The Navy raised no objection to G.E.'s asserting the set-off and Counterclaim, including those Counts of the Counterclaim which were stated to be for the ultimate benefit of the Navy.

s/ F. J. Balicki
F. J. Balicki

Sworn to May 26th, 1977.

EXHIBIT A

ASSISTANT NAVAL SEA SYSTEMS COMMAND
TECHNICAL REPRESENTATIVE
MACHINERY APPARATUS OPERATION
P.O. BOX 1021
SCHENECTADY, NEW YORK 12301

In Reply
3/5-3034/75
5800/1
CWC
5 December 1975

From: Assistant Naval Sea Systems Command Technical Representative, MAO
To: General Electric Company
Machinery Apparatus Operation
P.O. Box 1021
Schenectady, New York 12301
Attn: F.J. Balicki, Manager-Administration Operation

Subj:
Curtiss-Wright Conditional Acknowledgement of Redetermination Amendments

Ref:
(a) MAO ltr P5-256 dtd 7 November 1.75

1. Reference (a) requests ANSTR review and consent to a revision to the CWC redetermination cut off clause. ANSTR does not agree with reference (a).

2. ANSTR has no objection to the inclusion of the following:

Affidavit of F.J. Balicki

Seller reserves the right to pursue its request for extraordinary contractual relief under PL85-804 filed with the Department of the Navy.

3. The action taken by this letter is considered by the Government to be within the scope of existing prime contracts between MAO and the Government and does not authorize any delay in delivery or additional cost to the Government, either direct or indirect.

s/ H.A. Cardinale
H.A. CARDINALE

Affidavit of F.J. Balicki

EXHIBIT B

DEPARTMENT OF THE NAVY
NAVAL SEA SYSTEMS COMMAND
WASHINGTON, D.C. 20362

IN REPLY REFER TO
0246/WM
4280
Ser 484

General Electric Company
Machinery Apparatus Operation
P.O. Box 1021
Schenectady, New York 12301
Attention:
Mr. E. F. Phelps
General Manager

RECEIVED
F.J. BALICKI
JUL 29 1976
ADMINISTRATION OP.

Dear Sir:

Your letter of 14 July 1976 recommends acceptance of a qualified and partial claims release and final payment of withheld amounts on certain General Electric Company, Machinery Apparatus Operation (MAO) subcontracts with Curtiss-Wright Corporation. Briefly, the claims release which Curtiss-Wright proposes to give MAO would exclude claims set forth in a pending civil action filed by Curtiss-Wright against General Electric.

Affidavit of F.J. Balicki

As your letter notes, the basic issue is whether Curtiss-Wright should receive final payment on the orders in question while pursuing claims under these same orders. It is noted that such an action would be in direct conflict with Article 5, paragraph c, of the terms and conditions applicable to the subcontracts in question which requires an unqualified claims release as a condition precedent to final payment. Article 5c serves to encourage timely submittal and resolution of vendor claims. The action proposed by MAO would defeat this purpose of Article 5c.

Since Curtiss-Wright entered into these subcontracts cognizant of the terms and conditions, Curtiss-Wright either knew or should have known the consequences of not giving MAO an unqualified claims release at the time when final payment otherwise was due. Undoubtedly a part of the consideration received by Curtiss-Wright from MAO under the subcontracts was for Article 5c. Apparently, MAO would not receive consideration in return for deletion of the contract requirement for an unqualified claims release.

Notwithstanding the clarity of the subcontract terms which your letter appears to acknowledge, you raise the question of whether continued withholding under the subcontracts is conscionable and enforceable under the circumstances. The claims which Curtiss-Wright proposes be excepted from the claims release were filed years after the contracts were entered, and in many cases years after the occurrence of the events on which the claims are based. Curtiss-Wright was or should have been fully cognizant that this late identification of claims likely would result in withholding of final payment until the claims were resolved. Based on the above, it is clear that the existence of outstanding claims at the time when final payment otherwise would be due is the result of Curtiss-Wright's own actions, the consequences of which were or should have been known to Curtiss-Wright.

Affidavit of F.J. Balicki

Your letter draws an analogy between the claims release which you propose to accept and that judged acceptable to NAVSEA regarding the Curtiss-Wright Public Law 85-804 request. This analogy is not valid. Because the Curtiss-Wright Public Law 85-804 request was a direct Curtiss-Wright-NAVSEA concern, extracontractual in nature and not a claim under the subcontracts, Curtiss-Wright was not contractually obligated to give MAO a release of their right to pursue the Public Law 85-804 request. However, Curtiss-Wright's present pursuit of claims against MAO under its subcontracts requires, by the terms and conditions of the subcontracts, a withholding of monies until such time as an unqualified claims release is effected.

Another troublesome aspect of your proposed action is the dangerous precedent it would set for other subcontractors. By making a claims release a negotiable issue with vendors when final payment is otherwise due, the article's intent would be negated. There would be no incentive for subcontractors to resolve claims in a timely manner.

Based on the above, the qualified claims release proposed by Curtiss-Wright is not acceptable. Accordingly, your request for consent to the redetermination amendments between MAO and Curtiss-Wright is not granted.

Sincerely,

s/ William Mohney
WILLIAM MOHNEY
CONTRACTING OFFICER

EXHIBIT C

DEPARTMENT OF THE NAVY
NAVAL SEA SYSTEMS COMMAND
WASHINGTON, D.C. 20362

IN REPLY REFER TO
0246/WM
4280
Ser 1451

RECEIVED
DEC 21, 1976
R.C. RADICE
15 DEC 1976

General Electric Company
Machinery Apparatus Operation
Post Office Box 1021
Schenectady, New York 12301
Attn:
E.F. Phelps
General Manager

Ref:
(a) MAO ltr MAO-A6-91U of 14 Jul 76
(b) NAVSEA ltr 0246/WM 4280 Ser 484 of 28 Jul 76
(c) MAO ltr MAO-A6-131U of 27 Oct 76

Reference (a) requested Contracting Officer consent to redetermination amendments on subcontracts between the General Electric Company and Curtiss-Wright Corporation. Under your proposal, final payment would have been made to Curtiss-Wright and the subcontracts would have been redetermined upon receipt of a qualified claims release which

would have excluded claims set forth in a pending lawsuit filed by Curtiss-Wright against General Electric.

By reference (b), the Contracting Officer declined to grant consent to the redetermination amendments on the basis that the qualified release of claims offered by Curtiss-Wright does not meet the subcontract requirement for an unqualified release of claims prior to final payment.

Reference (c) against requests Contracting Officer consent to the redetermination amendments based on qualified claims releases from Curtiss-Wright. In addition, reference (c) recommends use of a surety bond to be procured by Curtiss-Wright.

The concept of a surety bond was noted in reference (a), and this approach was considered by the Contracting Officer in preparing reference (b). The Contracting Officer concluded that a surety bond or any other contractual vehicle which would allow final payment of withheld amounts prior to obtaining an unqualified claims release was not acceptable for the following reasons:

1. The principal purpose of the contract clause requiring an unqualified claims release prior to final payment is to encourage the timely submission and resolution of any claims which the supplier may have.

2. The claims release provision has been accepted by Curtiss-Wright in all its contracts for the Naval Nuclear Propulsion Program.

3. Release of withholding or use of a surety bond would defeat the purpose of the contract clause in question and could set a precedent whereby other Naval Nuclear .Propulsion

Program suppliers might conclude that they would be better off *not* to identify and settle claims promptly.

4. Curtiss-Wright's decision to submit large claims late in the performance of its orders results in the current withholding. Such withholding is in accordance with the terms of the contracts Curtiss-Wright entered into. Thus, there is no basis for extraordinary contractual vehicles such as a surety bond to relieve Curtiss-Wright of its contractual commitments.

Based on the above, your proposal to accept a qualified claims release and to release of final payments on Curtiss-Wright subcontracts, subject to a surety bond, is not acceptable. Accordingly, Contracting Officer consent to the redetermination amendments is not granted.

Sincerely,
s/ William Mohney
WILLIAM MOHNEY
CONTRACTING OFFICER

AFFIDAVIT OF J.A. RUSSELL, FILED MAY 31, 1977

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 76-794

[TITLE OMITTED]

STATE OF NEW YORK)
) SS
COUNTY OF SCHENECTADY)

J. A. RUSSELL, being duly sworn, deposes and states:

1. I have been an employee of the General Electric Company ("G.E.") since 1950 and am presently assigned to the Finance Section of G.E.'s Machinery Apparatus Operation ("M.A.O") and have been since 1976. I submit this Affidavit in support of G.E.'s Cross-Motion for Partial Summary Judgment and Opposition to the Motion of Plaintiff Curtiss-Wright Corporation ("Curtiss-Wright") for Partial Summary Judgment and to Strike Certain Defenses and to Dismiss the Counterclaim. I have personal knowledge of the matters set forth herein.

2. My responsibilities at M.A.O. include, among others, participation in the negotiation and administration of the prime contracts between G.E. and the United States Government by the authority of which M.A.O. participates in the Naval Nuclear Program.

3. Each of the prime contracts pursuant to which M.A.O. entered into the 21 purchase orders with Curtiss-Wright that are involved in this action is a cost-plus-fixed-fee contract. The prime contracts each contain the following clause (Article 6(c), General Provisions, Cost-Reimbursement Type Research and Development Contract):

> "Promptly after receipt of each invoice or voucher and statement of cost, the Government shall . . . make payment thereon as approved by the Contracting Officer."

Accordingly, G.E. is reimbursed by the United States Government for costs which it incurs in managing the 21 purchase orders with Curtiss-Wright.

4. Each of the prime contracts referred to in Paragraph 3 above contains the following clauses (Articles 6(d) and 6(f), General Provisions, Cost-Reimbursement Type Research and Development Contract):

> "At any time or times prior to final payment under this contract, the Contracting Officer may have the invoices or vouchers and statements of cost audited. Each payment theretofore made shall be subject to reduction for amounts included in the related invoice or voucher which are found by the Contracting Officer, on the basis of such audit, not to constitute allowable costs. Any payment may be reduced for overpayments, or increased for underpayments, on preceding invoices or vouchers.
>
> * * *
>
> "The Contractor [G.E.] agrees that any refunds, rebates, credits, or other amounts (including any interest thereon) accruing to or received by the Contractor or any assignee under this contract shall be paid by the Contractor to the Government, to the extent that they are properly allocable to costs for which the

> Contractor has been reimbursed by the Government under this Contract."

5. By operation of the clauses quoted in Paragraph 4 above, any amounts recovered by G. E. in this action that represent costs which have been incurred by G.E. and reimbursed by the United States Government must be paid to the United States Government by G.E.

s/ John A. Russell
J. A. RUSSELL

Sworn to May 26th, 1977.

STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 76-794

[TITLE OMITTED]

Pursuant to Rule 12F of this Court, Defendant General Electric Company ("G.E.") respectfully submits that the following are the material facts relevant to its Cross-Motion For Partial Summary Judgment as to which there is no genuine issue to be tried.

1. Between 1968 and 1972, G.E. and the Curtiss-Wright Corporation ("Curtiss-Wright") entered into a series of 21 purchase orders by which Curtiss-Wright agreed to produce, for delivery to the United States Navy ("Navy"), certain components used in the propulsion systems of nuclear submarines and surface vessels. Among these 21 purchase orders were purchase orders designated with the following numbers: B-382, B-384, B-410, B-412, B-425, A-550, A-595, A-642, B-423, B-429, B-433, and B-442. (Balicki Affidavit ¶ 2; Sullivan Affidavit ¶ 2.)

2. The following clause appears within each of the 21 purchase orders referred to in Paragraph 1 above:

> "Seller and each assignee under an assignment in effect at the time of final payment agree as a condition precedent to final payment that the Buyer and the Government, their respective officers, agents and employees are released from all liabilities, obligations and claims arising under or by virtue of this order. Seller further agrees that the final invoice shall

> constitute not less than 10 percent (10%) of the total order price."

(Balicki Affidavit ¶ 3, 5; Sullivan Affidavit ¶ 2.)

3. In 1968, during the negotiations for A-595, which was the second of the 21 purchase orders entered into between G.E. and Curtiss-Wright, the negotiators for Curtiss-Wright sought to exclude from this purchase order a provision for the withholding of money until final payment. Although G.E. made some concessions on other matters during the negotiations for this purchase order, the provision for withholding was not excluded, and Curtiss-Wright agreed to its inclusion. As stated in Paragraph 2 above, a provision for withholding has been agreed to by Curtiss-Wright in each and every purchase order involved in this action, including those entered into subsequent to A-595. (Balicki Affidavit ¶ 5.)

4. With respect to the 12 purchase orders listed in Paragraph 1 above, Curtiss-Wright has submitted invoices requesting final payment from G.E. Each of the invoices was accompanied by a "qualified release" in which Curtiss-Wright purported to release G.E. and the Government from all claims except those which are the subject of this action. (Balicki Affidavit ¶ 7-9; Sullivan Affidavit ¶ ¶ 4, 6.)

5. In order for G.E. to make final payment to Curtiss-Wright under each of the purchase orders referred to in Paragraph 1 above, the Navy must approve a final amendment to the purchase order which establishes the final, firm fixed price. (Balicki Affidavit ¶ 6.)

6. On three occasions, representatives of G.E. have recommended to the Navy that it should consider allowing final payment to be made to Curtiss-Wright, when final payment is

otherwise appropriate, even though Curtiss-Wright is seeking payment while simultaneously attempting to reserve to itself the claims against G.E. and the Government which are the subject of this action. On each occasion, the Navy declined to agree to this recommendation. (Balicki Affidavit ¶ 11.)

7. On April 30, 1976, Curtiss-Wright filed the Complaint in this action naming G.E. as Defendant.

8. The Complaint in this action asserts "claims arising under or by virtue of" each of the purchase orders referred to in Paragraph 1 above.

Respectfully submitted,

COLE AND GRONER, P.C.

By: _____
ISAAC N. GRONER
WALTER H. FLEISCHER
WILLIAM A. KAHN
LEE A. SCHUTZMAN
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1730 K Street, N.W.
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General Electric Company

Of Counsel:

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OPINION ON PARTIES' MOTIONS FOR SUMMARY JUDGMENT ON THE AMENDMENT TO AND SUPPLEMENTAL COMPLAINT, FILED DECEMBER 5, 1977

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 76-794

[TITLE OMITTED]

Appearances:

Messrs. Crummy, Del Deo, Dolan and Purcell
By: Mr. Ralph N. Del Deo
Attorneys for plaintiff

Messrs. Hannoch, Weisman, Stern and Besser
By: Mr. Albert G. Besser
Messrs. Cole and Groner
By: Mr. Isaac N. Groner (District of Columbia bar)
Attorneys for defendant

COOLAHAN, Senior District Judge

Plaintiff, Curtiss-Wright Corporation, and defendant, General Electric Company, a prime contractor of the United States Navy, entered into a series of 21 military procurement sub-contracts from 1968 to 1972 which called for Curtiss-Wright to produce, for delivery to the United States Navy, various components for use in nuclear submarines and surface vessels. On April 30, 1976, Curtiss-Wright filed a 16-count complaint in this court seeking damages and reformation with regard to these 21 subcontracts.[1] As permitted by order of this Court on

1. Plaintiff complains, *inter alia*, of misrepresentations by the defendant during negotiation and execution of the subcontracts and contractual breaches by the defendant during the course of plaintiff's performance.

Opinion Filed December 5, 1977

November 18, 1976, plaintiff filed an amendment to and supplemental complaint (adding counts 17 and 18) seeking, with regard to 12 of these subcontracts, the recovery of the sum of $8,378,536[2] representing the balance allegedly due for goods sold and delivered to defendant over and above the unliquidated damages sought in the original 16 counts of the complaint. It should be noted that there are also counterclaims involved in the instant lawsuit. Jurisdiction over this action exists pursuant to the diversity statute, 28 U.S.C. § 1332.

Curtiss-Wright has moved before this Court for an order granting partial summary judgment as to counts 17 and 18 of the amended complaint. General Electric also has moved for partial summary judgment in its favor as to these counts. The parties agree that the goods involved have already been manufactured and delivered by Curtiss-Wright.

As pointed out above, in the 17th and 18th counts of the amended complaint, plaintiff seeks to recover an $8,378,536 balance allegedly owed on 12 of the subcontracts between the parties. General Electric maintains that its continued withholding of that sum is justified under the subcontracts involved because a condition precedent to final payment has not been satisfied. The pertinent clause in the subcontracts reads:

> "Seller and each assignee under an assignment in effect at the time of final payment agree as a condition precedent to final payment, that the Buyer and the Government, their respective officers, agents and employees are released from all liabilities, obligations and

2. This figure represents approximately 10% of the aggregate prices set forth in the subcontracts. The remainder has already been paid to Curtiss-Wright by General Electric.

> claims arising under or by virtue of this order. Seller further agrees that the final invoice shall constitute not less than ten percent (10%) of the total order price."

It is the defendant's position that according to this clause, Curtiss-Wright must unqualifiedly release *all* claims against General Electric and the Government relating to the 12 subcontracts in question before it can recover the balance allegedly due under them. Since plaintiff has only offered a qualified release, excepting from the release those very claims it is asserting against defendant in this lawsuit, the defendant maintains that it is entitled to summary judgment on these counts of the complaint because this condition precedent to the right of plaintiff to receive final payment has not been satisfied. The plaintiff, on the other hand, believes that it is entitled to partial summary judgment on these counts, contending that the clause in question should be construed as having no application whatever in this context and thus should not be considered as a bar to plaintiff's right to recover the funds withheld thereunder.

The subcontracts between the parties contain provisions electing New York law as governing "in all respects." There is no reason why the parties' choice in this regard should not be honored. The pertinent New Jersey choice-of-law principles[3] indicate that the New Jersey courts, if faced with the issues presently before this Court, would honor the New York choice-of-law provisions included in these subcontracts since the applicable New York substantive law does not violate settled public policies of New Jersey and the transaction does bear a

3. Federal District Court jurisdiction over this case exists because of diversity of citizenship. Thus, New Jersey law must be applied, including New Jersey's choice-of-law rules. *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941).

reasonable relationship to the State of New York.[4] N.J.S.A. 12A:1-105(1); *Farris Engineering Corporation v. Service Bureau Corporation*, 406 F.2d 519, 521 (3d Cir. 1969); *Congress Factors v. Malden Mills, Inc.*, 332 F. Supp. 1384, 1390 (D. N.J. 1971).

Plaintiff primarily relies on *Tufano Contracting Corp. v. Port of New York Authority*, 33 Misc. 2d 1028, 227 N.Y.S. 2d 707 (Sup. Ct. 1962), *aff'd*, 18 A.D. 2d 832, 237 N.Y.S. 2d 562 (2d Dept. 1963), *aff'd*, 13 N.Y. 2d 967, 244 N.Y.S. 2d 643, 194 N.E. 2d 603 (Ct. App. 1963), in support of its position. In that case, the plaintiff contractor had performed pursuant to a contract with the defendant Port of New York Authority and had thereafter commenced suit against the Authority for the payment of balances allegedly due under the construction contract, for compensation for extra work done thereunder, and for damages due to alleged contractual breaches by the defendant. The parties had included in their agreement a clause similar in language and effect to the clause involved in the instant case, and plaintiff similarly was moving for partial summary judgment on its claim for the balances due. The pertinent clause read:

> "The acceptance by the Contractor, or by anyone claiming by or through him, of the Final Payment shall be and shall operate as a release to the Authority of all claims and of all liability to the Contractor for all things done or furnished in connection with this Contract and for every act and neglect of the Authority and others relating to or arising out of this Contract, excepting only his claims for amounts withheld by the Authority

4. Both plaintiff and defendant have also agreed in their briefs that New York law is to govern.

> as hereinafter provided and for interest upon the Final Payment, if this payment is improperly delayed."

Tufano Contracting Corp., 227 N.Y.S. 2d at 708. In opposition to the motion, defendant argued:

> ". . . Judgment for plaintiff on its first cause of action could be given at this time only by ignoring the plain provisions of the contract in suit to the effect that acceptance by plaintiff of a final payment operates as a release to the Port Authority."

Tufano Contracting Corp., 227 N.Y.S. 2d at 708. This is substantially the same argument being made by General Electric in opposition to Curtiss-Wright's partial summary judgment motion and in support of its own motion for partial summary judgment.

The trial court in *Tufano* pointed out quite correctly that the release clause was valid and would be enforced if a contractor accepted final payment and thereafter attempted to assert claims under the same contracts. 227 N.Y.S. 2d at 708. *See also Brandt Corp. v. City of New York*, 14 N.Y. 2d 217, 250 N.Y.S. 2d 407, 199 N.E. 2d 493 (1964); *Buffalo Elec. Co. v. State*, 14 N.Y. 2d 453, 253 N.Y.S. 2d 537, 201 N.E. 2d 869 (1964). However, in *Tufano*, the contractor did not accept final payment, but instead filed suit asserting claims both for the final payments and for other contractual relief. The trial court stated that in so doing the "plaintiff did not contract away its right to sue for sums which it had earned," 227 N.Y.S. 2d at 708, and ultimately ruled:

> ". . . the release clause nowhere prescribes the time when judgment may be entered after such action is brought. Nor does the court consider judgment on the first cause of action to be final payment under the release clause of the contract."

227 N.Y.S. 2d at 708-709. Thus the court was of the opinion that summary judgment on the claim for the balances due did not constitute acceptance of "final payment" for purposes of the contractual provision that acceptance of final payment would operate as a release to the defendant.

The Supreme Court's decision in *Tufano* was affirmed by the Appellate Division and by the New York Court of Appeals. The Appellate Division agreed that plaintiff's acceptance of payment pursuant to the partial summary judgment ruling should not be deemed the equivalent of voluntary acceptance of final payment under the clause in question and thus would not result in the release of its other claims arising out of the contract. The Court of Appeals affirmed without opinion.

The pertinent contractual provision in the present case is strikingly similar to that involved in *Tufano*. It likewise provides that acceptance of final payment by Curtiss-Wright should operate to release General Electric and the Government from "all liabilities, obligations and claims arising under" the various contracts between the parties. According to *Tufano*, the contracts in question do not prescribe the time when judgment may be entered on a claim for the amount withheld after an action such as the present one has been instituted. 227 N.Y.S. 2d at 708-709. Thus the contractual clauses in question are not expressly applicable in the context of the instant motions for partial summary judgment. Therefore, payment to Curtiss-Wright of the balances due pursuant to an order of the Court

would not constitute "final payment" as to result in a release of General Electric and the Government from "all liabilities, obligations and claims arising under" the contract between Curtiss-Wright and General Electric.

The defendant has claimed that *Tufano* is not apposite and that instead *R.J. Marshall, Inc. v. Turner Construction Co.*, 139 N.Y.S. 2d 55 (Sup. Ct. 1955), represents the controlling authority under New York case law. In *R.J. Marshall,* a subcontractor had moved for partial summary judgment upon its first cause of action against a contractor for the alleged balance owing under a written contract. The contract in question specifically provided:

> ". . . Prior to final payment, the subcontractor shall execute and deliver to Turner (the contractor), a General Release in a form satisfactory to Turner, holding Turner and the Owner free and harmless from all claims arising out of, or in connection with, this contract."

139 N.Y.S. 2d at 57. The defendant, in opposition to the summary judgment motion, had alleged that a condition precedent to plaintiff's right to final payment had not been complied with, that being the execution by plaintiff to defendant of a general release as called for by the contract. The court ruled that plaintiff's contention that the condition precedent had been waived by defendant presented a question not properly the subject of summary disposition. The court also held that such a clause could preclude partial summary judgment and would be so enforced.

R.J. Marshall is distinguishable from both *Tufano Contracting Corp.* and the case *sub judice.* In *R.J. Marshall* the

parties had expressly provided for the performance of a specific act before the right to final payment was to accrue. In the present case and in *Tufano* the fact of final payment was fashioned by the contracts to operate as the release. The contracts between Curtiss-Wright and General Electric state that the parties "agree as a condition precedent for final payment, that the Buyer and the Government . . . are released." The fact of final payment was to result in a release of General Electric and the Government, the release being the condition attached to final payment. The pertinent clause in *Tufano* was similar in this respect. The contractual provision in *R.J. Marshall,* however, in requiring a written release before final payment was to become due, might be considered applicable in the context of partial summary judgment. In any event, the relevant contractual provision in the instant case is closer in language and effect to that involved in *Tufano* and thus should also not be considered applicable to the issues presently before this Court. *Tufano Contracting Corp.*, 227 N.Y.S. 2d at 708-709.

Alternatively, to the extent that *R.J. Marshall* may be deemed apposite, that is, to the extent that the contract presently before this Court more closely resembles that involved in *R.J. Marshall* than that in *Tufano,* this Court must now consider *R.J. Marshall* to have been repudiated by the subsequent decisions of the New York courts in *Tufano.*[5] *Tufano's* definition of "final payment" as not including an award by a court pursuant to an application for partial summary judgment must be regarded as also applicable in the *R.J. Marshall* situation as well. The *Tufano* case is the more recent of the two cases and was affirmed with opinion by the Appellate Division and affirmed without opinion by the New York Court of Appeals.

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5. The New York courts in *Tufano* did not refer to the opinion in *R.J. Marshall, Inc. v. Turner Construction Company.*

Opinion Filed December 5, 1977

Since New York law is to govern,[6] *Tufano* must be considered as the controlling authority in New York on the issues immediately before this Court.

For the foregoing reasons, the defendant is not justified in withholding final payment from the plaintiff at this time because of the "final payment" clause in the subcontracts between the parties. Furthermore, any acceptance by Curtiss-Wright of payment from General Electric pursuant to this Court's ruling will not operate to release General Electric and the Government from the other claims of plaintiff Curtiss-Wright which are presently the subject of this lawsuit. The parties in this action agree, and the New York case law is in accord, that the issue of interest due on any moneys withheld is not properly before the Court at this time. Therefore, the Court will not make any ruling on that issue. The parties are instructed to submit an appropriate order.

6. See pp. 3-4, *supra*.

ORDER DENYING PLAINTIFF'S MOTIONS TO STRIKE DEFENDANT'S SEVENTEENTH DEFENSE AND TO DISMISS DEFENDANT'S COUNTERCLAIM, FILED FEBRUARY 24, 1978

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 76-794

[TITLE OMITTED]

This matter having been opened to the Court upon Plaintiff's motion to dismiss the Counterclaim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted and to strike Defendant's 17th Affirmative Defense pursuant to Rule 12(f) of the Federal Rules of Civil Procedure, and the Court having considered the moving papers and briefs filed on behalf of the parties, and the Court having further considered the oral argument of counsel,

It is, on this 24th day of February, 1978,

ORDERED:

(1) That plaintiff's motion to dismiss the Counterclaim for failure to state a claim upon which relief can be granted be and the same is hereby denied, and the parties are left to their proofs as to whether Defendant gave adequate notice of the claims upon which it seeks to recover under the Counterclaim; and

(2) That Plaintiff's motion to strike the Seventeenth Affirmative Defense of set-off on the ground of failure to plead adequate notice be and the same is hereby denied, and the parties are left to their proofs as to whether Defendant gave

Order Filed February 24, 1978

adequate notice of the claim it seeks to set off under the Seventeenth Affirmative Defense.

s/ James A. Coolahan
James A. Coolahan
U.S. Senior District Judge

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON THE AMENDMENT TO AND SUPPLEMENTAL COMPLAINT, GRANTING PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S EIGHTEENTH AND NINETEENTH DEFENSES, DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON THE AMENDMENT TO AND SUPPLEMENTAL COMPLAINT, AND DEFERRING FOR LATER CONSIDERATION THE QUESTION OF PREJUDGMENT INTEREST, FILED FEBRUARY 24, 1978

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 76-794

[TITLE OMITTED]

This matter having been opened to the Court upon (1) Plaintiff's motion pursuant to Rule 12f of the Federal Rules of Civil Procedure to strike Defendant's Eighteenth and Nineteenth Affirmative Defenses, (2) Plaintiff's motion for partial summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and (3) Defendant's cross-motion for partial summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and this Court having considered the moving papers and briefs filed by the parties, and the Court having further considered the oral argument of counsel, and pursuant to this Court's opinion filed December 5, 1977,

It is, on this 24th day of February, 1978,

ORDERED:

1. That Plaintiff's motion to strike Defendant's Eighteenth Affirmative Defense be and the same is hereby granted;

2. That Plaintiff's motion to strike Defendant's Nineteenth Affirmative Defense be and the same is hereby granted;

3. That Plaintiff's motion for summary judgment on the Seventeenth Count of the Amendment to and Supplemental Complaint in the amount of $3,673,584.00 be and the same is hereby granted, and any acceptance by Plaintiff of payment from Defendant pursuant to this Order will not operate to release Defendant and the Government, their officers, agents and employees from (1) the other claims of Plaintiff that are presently the subject of this lawsuit, (2) any other claim of Plaintiff as to any contract not listed in paragraphs 127 and 132 of the Amendment to and Supplemental Complaint, and (3) any claim of Plaintiff for final payment under any contract which is not listed in paragraphs 127 and 132 of the Amendment to and Supplemental Complaint;

4. That Plaintiff's motion for summary judgment on the Eighteenth Count of the Amendment to and Supplemental Complaint in the amount of $4,704,952.00 be and the same is hereby granted, and any acceptance by Plaintiff of payment from Defendant pursuant to this Order will not operate to release Defendant and the Government, their officers, agents and employees from (1) the other claims of Plaintiff that are presently the subject of this lawsuit, (2) any other claim of Plaintiff as to any contract not listed in paragraphs 127 and 132 of the Amendment to and Supplemental Complaint, and (3) any claim of Plaintiff for final payment under any contract which is not listed in paragraphs 127 and 132 of the Amendment to and Supplemental Complaint;

5. That Defendant's motion for summary judgment on the Seventeenth Count of the Amendment to and Supplemental Complaint be and the same is hereby denied;

6. That Defendant's motion for summary judgment on the Eighteenth Count of the Amendment to and Supplemental Complaint be and the same is hereby denied; and

7. That the question of prejudgment interest is hereby deferred for later consideration by this Court.

s/ James A. Coolahan
James A. Coolahan
U.S. Senior District Judge

LETTER OPINION ON PLAINTIFF'S REQUEST FOR RULE 54(b) CERTIFICATION, FILED FEBRUARY 24, 1978

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
NEWARK, N.J. 07102

Chambers of
JAMES A. COOLAHAN
SR. JUDGE

February 24, 1978

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Isaac N. Groner, Esq.
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1730 K Street, N.W.
Washington, D.C. 20006

Gentlemen:

Curtiss-Wright Corp. v. General Electric Co.
Civil Action No. 76-794

Plaintiff, Curtiss-Wright Corporation, has requested Rule 54(b) certification of this Court's ruling of December 5, 1977 as to Counts 17 and 18 of plaintiff's Amendment to and Supplemental Complaint. However, such certification cannot be granted since the claims involved have not been *finally*

adjudicated within the meaning of Rule 54(b). The matter of pre-judgment interest has not yet been resolved. *See Cinerama, Inc. v. Sweet Music, S.A.*, 482 F.2d 66 (2d Cir. 1973).

Furthermore, it would not be proper for this Court to decide at this time whether Rule 54(b) certification should be granted upon resolution of the pre-judgment interest issue. The weighing process which must be undertaken by a District Court in exercising its discretion under Rule 54(b) should not be attempted before the claims involved have themselves been finally adjudicated. After the resolution of the pre-judgment interest question, the Court will promptly exercise its Rule 54(b) discretion.

Accordingly, on this date, I have signed orders which reflect rulings made in this case from the bench on September 26, 1977 and by opinion filed December 5, 1977.

s/ James A. Coolahan
James A. Coolahan
U.S. Senior District Judge

Original filed with
Clerk of the Court

OPINION ON PLAINTIFF'S MOTION FOR AN AWARD OF PREJUDGMENT INTEREST, FILED JUNE 20, 1978

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 76-794

[TITLE OMITTED]

Appearances:

Messrs. Crummy, Del Deo, Dolan and Purcell
By: Mr. Ralph N. Del Deo
Attorneys for plaintiff

Messrs. Hannoch, Weisman, Stern and Besser
By: Mr. Albert G. Besser
Messrs. Cole and Groner
By: Mr. Isaac N. Groner (District of Columbia bar)
Attorneys for defendant

COOLAHAN, Senior District Judge

The facts of this case were adequately set forth in the opinion filed December 5, 1977. In that opinion, I decided that plaintiff was entitled to partial summary judgment on counts 17 and 18 of its Amendment to and Supplemental Complaint in the amounts of $3,673,584 and $4,704,952 respectively. I signed an order to that effect on February 24, 1978. By letter opinion of February 24, 1978, I also determined that Fed. R. Civ. P. 54(b) certification of that judgment as "final" would not be proper because the matter of prejudgment interest on the awarded sums had not yet been resolved. Consequently, plaintiff Curtiss-Wright has now moved this Court for an award of prejudgment interest upon counts 17 and 18 of the Amendment to and Supplemental Complaint.

Opinion Filed June 20, 1978

The Applicable Law

The contracts between the parties contain provisions electing New York law as governing "in all respects." As explained in the opinion of December 5, 1977, there is no reason why the parties' choice in this regard should not be honored. In this context, the issue of prejudgment interest is necessarily an element of the measure of damages to be awarded for breach of contract. Under generally accepted conflict-of-laws principles, issues as to the measure of damages and prejudgment interest are governed by the local law of the State whose law has been selected for other purposes by the parties in a choice-of-law clause. *Restatement (Second), Conflict of Laws* §§187, 207 (1971). Thus, New York law will govern as to plaintiff's entitlement to prejudgment interest.

Plaintiff's Entitlement to Prejudgment Interest

The major issue which must be resolved is the effect of a clause in the contracts which provides that final payment results in or is conditioned upon a release of all further claims. This question has been squarely resolved by the Appellate Division of the New York Supreme Court in plaintiff's favor. In *Byrne Construction Company v. New York State Thruway Authority,* 19 A.D. 2d 192, 241 N.Y.S. 2d 58 (App. Div.), *leave to appeal denied,* 13 N.Y. 2d 598, 244 N.Y.S. 2d 1025, 194 N.E. 2d 605 (1963), the Appellate Division of the New York Supreme Court awarded prejudgment interest to a similarly situated claimant. As in the instant case, the contract involved in *Byrne* contained a "final payment-release" clause which provided that final payment resulted in or was conditioned upon a release of all further claims. The *Byrne* court held that the clause did not bar an award of prejudgment interest upon the undisputed balance of the contract price and, furthermore, that the clause did not condition the entitlement to interest upon the claimant's

successful prosecution of its remaining claims, a position asserted unsuccessfully by both the defendant in *Byrne* and by General Electric herein.

Defendant General Electric relies on a line of later New York decisions in support of its position that plaintiff cannot recover for prejudgment interest or can only recover prejudgment interest if it prevails on its other causes of action. Defendant cites *Yonkers Contracting Company v. New York State Thruway Authority,* 25 N.Y. 2d 1, 302 N.Y.S. 2d 521, 250 N.E. 2d 27 (1969), and *Terry Contracting, Inc. v. State of New York,* 23 N.Y. 2d 167, 295 N.Y.S. 2d 897, 243 N.E. 2d 125 (1968) (both of which were founded upon *William Higgins & Sons, Inc. v. State of New York,* 20 N.Y. 2d 425, 284 N.Y.S. 2d 697, 231 N.E. 2d 285 (1967)). This reliance, however, is misplaced. In all of the above cases, the applicable contracts contained not only "final payment-release" clauses of the type involved in *Byrne* and the instant case, but also contained contractual provisions which provided that rejection of a tender of final payment by the claimant constituted a waiver of any claim to prejudgment interest upon the tendered amount. It is vital to note that the Appellate Division of the New York Supreme Court in *Byrne* also expressly recognized this difference in contractual language in distinguishing a New York Court of Appeals case which contained a "rejection of tender-waiver of interest" clause:

> "The State maintains that the recent decision of the Court of Appeals in *Wood v. State,* 12 N.Y. 2d 25, 234 N.Y.S. 2d 204, 186 N.E. 2d 406 approved and adopted the State's theory that the right to interest depends upon the outcome of the extra work claim. An examination of the record and briefs in the Court of Appeals in the *Wood* case demonstrates that the State's assertion with respect to its holding is incorrect. The decision in

> the *Wood* case turned upon a clause in the contract there in suit (following the clause that acceptance of final payment would operate as a release of all claims) reading: 'Should the Contractor refuse to accept the final payment as tendered by the Comptroller, it shall constitute a waiver of interest thereon.' This is the clause referred to in the Court of Appeals opinion (12 N.Y. 2d p. 29, 234 N.Y.S. 2d p. 206, 186 N.E. 2d p. 408) in the statement that 'by the terms of the contract, claimant is not entitled to interest on the tendered amount,' the court noting that the State had 'tendered to claimant the amount due under the contract.' There is no provision such as that contained in the *Wood* contract in the contract involved in this case.
>
> . . . . .
>
> In a case in which a clause like that in the *Wood* contract is not present, we must apply the general principle that, in order to stop the running of interest on an undisputed obligation, a tender of payment must be unconditional. . . . The tender in this case was not an unconditional one but was conditioned upon a release of all claims including extra work claims. The claimant was justified in rejecting the tender and in suing in the Court of Claims both for the unpaid contract balance and for the extra work claim it had made in good faith. It is therefore entitled to interest upon the contract balance for the period from the date of the acceptance of the work to the date of the payment of the judgment against the Thruway. Authority."

Byrne, supra, 241 N.Y.S. 2d at 61-62.

Thus, *Byrne* necessarily stands for the proposition that where the contract only contains a "final payment-release" clause and does not contain a "rejection of tender-waiver of interest" clause, the plaintiff is entitled to prejudgment interest on the uncontested claims regardless of the outcome of its remaining claims. Although the treatment accorded to the "rejection of tender-waiver of interest" clause at the time of *Byrne* may seem to differ from that adopted in the later cases of *Yonkers, supra, Terry, supra,* and *Higgins, supra,*[1] the distinction in contractual language recognized in *Byrne* nevertheless remains valid.

Defendant argues that the "rejection of tender-waiver of interest" clauses cannot explain why recovery of interest was conditioned on the success of the remaining claims in *Yonkers, Terry,* and *Higgins.* Defendant contends that in those cases it was held that the "rejection of tender-waiver of interest" clauses were waived and of no further effect after the defendants therein consented to severance of the claims for the undisputed balances and agreed to postponement of the decisions on the prejudgment interest issues. This, however, would be inconsistent with the holding in *Byrne, supra.*[2] It would be more accurate to say that the consent to severance and postponement of the decision on the prejudgment interest issue was deemed to be a waiver by the

1. It is not altogether clear that the construction of the "rejection of tender-waiver of interest" clause has changed since *Wood v. State, supra,* was decided (discussed in the *Byrne* excerpt). The holding in *Wood* has not been overturned by the New York Court of Appeals but was distinguished by that court in *William Higgins & Sons, Inc. v. State of New York, supra.*

2. Without the "rejection of tender-waiver of interest" clauses, the contractual language in *Yonkers* and *Byrne* would be nearly identical. Yet the courts in *Yonkers* and *Byrne* reached different conclusions on the prejudgment interest issue.

defendants of *strict enforcement*[3] of the "rejection of tender-waiver of interest" clauses and that the effect of the clauses was modified to preclude recovery of interest only if the claims which the plaintiffs sought to retain by rejecting the tender of payment were proven not to be meritorious.

Thus, in accordance with the clear holding of the Appellate Division of the New York Supreme Court in *Byrne, supra,* plaintiff is entitled to prejudgment interest. This declaration of New York law and policy made by a New York court as to the construction to be given to these "final payment-release" clauses cannot be disturbed by this Court in the exercise of its diversity jurisdiction.

When Interest Begins to Run

New York Civ. Prac. Law & R. §5001 provides that prejudgment interest begins to run as of the earliest date that the cause of action existed. This date would necessarily be that date, according to the contracts, when the final payments were due.

The parties agreed at oral argument as to the dates from which prejudgment interest would run in the event that the Court finds that plaintiff is, in fact, entitled to prejudgment interest. Therefore, the applicable dates from which prejudgment interest will run for each of the 12 purchase orders enumerated in counts 17 and 18 of the Amendment to and Supplemental Complaint are:

3. Strict enforcement would preclude the recovery of interest regardless of the validity of the remaining claims.

Opinion Filed June 20, 1978

Purchase Order	Date Interest Begins to Run
B-425	November 30, 1975
B-384	November 30, 1975
B-410	December 5, 1975
B-442	June 18, 1976
B-433	June 18, 1976
B-423	June 18, 1976
A-550	July 20, 1977
A-595	January 9, 1978
A-642	June 18, 1976
B-429	October 30, 1976
B-382	November 30, 1975
B-412	November 30, 1975

The Rate of Interest

Because of the choice-of-law clauses appearing in the parties' contracts, New York law governs the issue of prejudgment interest in this case, including the applicable rate. *Restatement (Second), Conflict of Laws* §207, Comment e (1971). Under New York law, the rate of prejudgment interest is fixed by statute at six percent per annum. N.Y. Civ. Prac. Law & R. §5004. Thus, the rate of interest to be awarded plaintiff must be six percent. Although plaintiff maintains for various reasons that the rate should be other than as set forth above, the equitable factors presented do not give rise to a sufficiently strong public policy of this State, under the applicable conflict-of-laws principles, to warrant overriding the parties' contractual choice in this regard.

Opinion Filed June 20, 1978

Conclusion

In conclusion, I find that plaintiff is entitled to prejudgment interest at the rate of 6% per annum on those subcontracts enumerated in counts 17 and 18 of the Amendment to and Supplemental Complaint from those dates set forth herein.

The parties are instructed to submit an appropriate order.

FOURTH SUPPLEMENTAL AFFIDAVIT OF JAMES H. SULLIVAN, FILED JULY 21, 1978 WITH ATTACHMENTS

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 76-794

(Hon. James A. Coolahan)

[TITLE OMITTED]

STATE OF NEW JERSEY :
: ss.
COUNTY OF BERGEN :

I, JAMES H. SULLIVAN, of full age, being duly sworn according to law, upon my oath depose and day:

1. I am employed as General Manager - Nuclear Facility by Curtiss-Wright Corporation (hereinafter "Curtiss-Wright"), plaintiff in the above captioned matter. In this action, I have previously submitted Affidavits dated May 2, 1977, January 19, 1978, March 21, 1978, and May 17, 1978. I submit this Fourth Supplemental Affidavit in support of plaintiff's motion for summary judgment with prejudgment interest on Count 19 of the Additional Supplemental Complaint in this action.

2. The records of Curtiss-Wright reflect that between May 29, 1969, and September 29, 1972, Curtiss-Wright entered into 9 subcontracts with the General Electric Company (hereinafter "General Electric"), defendant in the above captioned matter, pursuant to which Curtiss-Wright agreed to supply a total of 94 large components for use in nuclear propulsion systems of naval vessels. These 9 subcontracts are designated as Purchase Order Nos.: B-451, B-452, B-458, A-641, A-661, A-656, A-675, B-478, and A-113 (hereinafter "the 9 Purchase Orders").

Fourth Supplemental Affidavit

3. Curtiss-Wright has made delivery of each of the large components called for by the 9 Purchase Orders and has otherwise performed all of the terms and conditions of said Purchase Orders which were to be performed by it.

4. Curtiss-Wright has submitted to General Electric the final invoices for each of the 9 Purchase Orders. Each invoice was accompanied by a qualified release, a sample of which has been attached hereto as "Exhibit B".

5. As of this date, General Electric has failed to make final payment under each of the 9 Purchase Orders.

6. Attached to this Affidavit as "Exhibit A" is a "Schedule of Liquidated Claims" which sets forth, as to each of the 9 Purchase Orders, (a) a description of the components involved, (b) the date of the original Purchase Order, (c) date of contract completion, (d) the date Curtiss-Wright's final cost data was submitted to the Defense Contract Auditing Agency of the United States Department of Defense (DCAA), (e) the date of DCAA audit was issued, (f) the date the final invoice was submitted, and (g) the total value, exclusive of interest, of the final payment due Curtiss-Wright.

7. Based on the position taken by General Electric with regard to the 12 Purchase Orders which are the subject of the 17th and 18th Counts of the Amendment To And Supplemental Complaint in this action (see Paragraph 10 of my Affidavit in this action dated May 2, 1977), it would appear that General Electric has not made final payment under the 9 Purchase Orders due to the dispute as to Curtiss-Wright's position that it could submit qualified releases at the time of final invoicing. (Although final payment under Purchase Order A-113 is not due until August 10, 1978, based on the foregoing, I have no reason to believe that General Electric will tender final payment at that

time). As of this date, I am unaware of any dispute between General Electric and Curtiss-Wright as to the amount due Curtiss-Wright as final payment under the 9 Purchase Orders.

8. The total amount of the final payments due Curtiss-Wright on the 9 Purchase Orders is $10,535,881.00, exclusive of interest.

9. Each of the 9 Purchase Orders provides as the "Terms of Payment" that payment shall be made "Net 30 days" from the date on which demand for payment is made. None of the 9 Purchase Orders makes any provision for a waiver of interest by Curtiss-Wright.

s/ James H. Sullivan
JAMES H. SULLIVAN

Sworn to July 17th, 1978.

EXHIBIT A — SCHEDULE OF LIQUIDATED CLAIMS

P.O. No.	Description	Original P.O. Date	Date Contract Completed	Date Final Cost Data Submitted	Date DCAA Audit Issued	Date Invoice Submitted	$ Value of Final Payment Excluding Interest
B-451	(2) S6G Pressurizers	2/26/71	11/25/75	5/3/76	12/14/76	12/22/76	$ 292,564.00
B-452	(10) S6G Steam Generators	3/6/71	7/16/76	9/27/76	12/1/76	12/16/76	2,543,025.00
B-428	(6) D2G Pressurizers	3/5/70	5/25/76	10/7/76	11/10/76	12/22/76	496,519.00
A-641	(2) D2G Vessels, Heads, Shields	5/29/69	1/25/78	12/23/76	1/18/77	2/3/77	553,506.00
A-656	(5) S6G Vessels, Heads, Shields	11/11/69	3/11/77	1/7/77	2/1/77	4/13/77	1,436,148.00
A-661	(4) D2G Vessels, Heads, Shields	3/4/70	6/19/78	1/7/77	1/24/77	10/31/77	1,144,786.00
A-675	(6) S6G Vessels, Heads, Shields	9/30/70	3/10/78	11/10/77	2/3/78	2/9/78	1,831,466.00
B-478	(10) S6G Steam Generators	9/29/72	10/4/77	2/28/78	5/1/78	4/28/78	1,370,817.00
A-113	(5) S6G Vessels, Heads, Shields	9/29/72	6/29/78	2/28/78	5/11/78	7/11/78	867,050.00
						Total	$10,535,881.00

Fourth Supplemental Affidavit

EXHIBIT B

CURTISS-WRIGHT CORPORATION

One Passaic Street, Wood-Ridge, New Jersey 07075

C-WC Ref. No. A-78-9

General Electric Company
Machinery Apparatus Operation
Post Office Box 1021
Schenectady, New York 12301

Attention: Mr. W. Northrop

Subject: GE/MAO-C-WC Contracts — Final Payment

Dear Mr. Northrop:

Pursuant to the terms of Purchase Order No. A-113 and in consideration of the sum of Eight Hundred Sixty Seven Thousand and Fifty Dollars ($867,050), which has been or is to be paid under the said Purchase Order to Curtiss-Wright Corporation, One Passaic Street, Wood-Ridge, New Jersey, Curtiss-Wright Corporation, upon payment of the said sum by General Electric Company, does remise, release and discharge General Electric Company and the Government, their officers, agents and employees, of and from all liabilities, obligations, claims and demands whatsoever under or arising from the said Purchase Order, except such claims as are set forth in a certain civil action entitled Curtiss-Wright Corporation, Plaintiff, versus General Electric Company, Defendant, File No. 76-794, pending in the United States District Court for the District of New Jersey.

Fourth Supplemental Affidavit

IN WITNESS WHEREOF, this Release has been executed this *eleventh* day of *July*, 1978.

CURTISS-WRIGHT CORPORATION

s/ Richard P. Sprigle
Richard P. Sprigle
Senior Vice President

CERTIFICATE

I, Francis E. Fallon, certify that I am the Secretary of Curtiss-Wright Corporation named in the foregoing Release; that Richard P. Sprigle who signed said Release on behalf of Curtiss-Wright Corporation, is the Senior Vice President of said Corporation; that said Release was duly signed for and in behalf of said Corporation by authority of its governing body and is within the scope of its corporate powers.

s/ Francis E. Fallon
Francis E. Fallon

Corporate Seal

ORDER GRANTING PLAINTIFF'S MOTION FOR AN AWARD OF PREJUDGMENT INTEREST ON THE AMENDMENT TO AND SUPPLEMENTAL COMPLAINT, FILED JULY 27, 1978

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 76-794

(Hon. James A. Coolahan)

[TITLE OMITTED]

This matter having been opened to the Court upon the motion of plaintiff, Curtiss-Wright Corporation, for an award of prejudgment interest on Counts 17 and 18 of the Amendment To And Supplemental Complaint, this Court having entered an Order on February 24, 1978 granting plaintiff's motion for partial summary judgment on said Counts, and the Court having considered the moving papers and briefs submitted by the parties, and the Court having further considered the oral argument of counsel, and good and sufficient cause having been shown, for the reasons set forth in this Court's opinion filed June 20, 1978,

It is on this 27th day of July, 1978,

ORDERED, that plaintiff, Curtiss-Wright Corporation's motion for an award of prejudgment interest on Counts 17 and 18 of the Amendment To And Supplemental Complaint be and the same is hereby granted, and it is further

ORDERED, that prejudgment simple interest at the rate of six percent per annum shall run from the following dates with respect to each of the 12 purchase orders enumerated in Counts 17 and 18 of the Amendment To And Supplemental Complaint:

Order Filed July 27, 1978

Purchase Order	Date Interest Begins To Run
B-425	November 30, 1975
B-384	November 30, 1975
B-410	December 5, 1975
B-442	June 18, 1976
B-433	June 18, 1976
B-423	June 18, 1976
A-550	July 20, 1977
A-595	January 9, 1978
A-642	June 18, 1976
B-429	October 30, 1976
B-382	November 30, 1975
B-412	November 30, 1975

s/ James A. Coolahan
JAMES A. COOLAHAN
U.S. Senior District Judge

LETTER OPINION DIRECTING THAT FINAL JUDGMENT BE ENTERED UNDER RULE 54(b) ON THE COURT'S PRIOR ORDERS AWARDING PLAINTIFF SUMMARY JUDGMENT WITH PREJUDGMENT INTEREST ON THE AMENDMENT TO AND SUPPLEMENTAL COMPLAINT, FILED JULY 27, 1978

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
NEWARK, N.J. 07102

Chambers of
JAMES A. COOLAHAN
SR. JUDGE

July 27, 1978

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Gentlemen:

Curtiss-Wright Corp. v. General Electric Co.
Civil Action No. 76-794

Letter Opinion Filed July 27, 1978

Plaintiff, Curtiss-Wright Corporation, has moved for Rule 54(b) certification of this Court's orders of February 24, 1978, and July 27, 1978, which granted to plaintiff summary judgment and prejudgment interest upon counts 17 and 18 of the Amendment to and Supplemental Complaint. Plaintiff's prior motion for Rule 54(b) certification of the order of February 24, 1978, alone was denied by Letter Opinion of February 24, 1978, because at that time the matter of prejudgment interest had not yet been resolved. *See Cinerama, Inc. v. Sweet Music, S.A.*, 482 F.2d 66 (2d Cir. 1973).

It is clear that Rule 54(b) certification is not to be granted as a matter of course and that this remedy should be reserved for the infrequent harsh case because of the overload which would otherwise result in the federal appellate courts. Furthermore, it is also well established that the considerations which are involved in a grant of summary judgment are not the same considerations relevant to an order of final certification under Rule 54(b). The essential inquiry is whether, after balancing the competing factors, finality of judgment should be ordered to advance the interests of sound judicial administration and justice to the litigants. *Allis-Chalmers Corp. v. Philadelphia Electric Co.*, 521 F.2d 360 (3d Cir. 1975).

In the instant case, certification of the above orders could not, in any way, result in unnecessary appellate review. The claims which have been finally adjudicated are separate, distinct, and independent of any of the other claims or counterclaims involved in this lawsuit. Plaintiff's other claims generally seek recovery for alleged cost overruns and lost profits, and defendant's counterclaims generally seek to recover for the costs of alleged technical assistance provided by the defendant to the plaintiff. For this reason, certification should not prevent the rest of this case from being prepared for trial. Also, because of the above, the need for review will not be mooted by any future developments in the District Court. The determinations by the

Letter Opinion Filed July 27, 1978

District Court regarding the claims sought to be certified under Rule 54(b) are final and will not be changed by later developments in the District Court. Furthermore, because of the nature of the claims which are involved, the appellate courts will not need to decide the same issues more than once even if two appeals arise out of this case.

Justice to the litigants will also be advanced by certifying the above orders. Plaintiff has sustained, and will continue to sustain, losses due to delay in payment of the sums which are owed. Plaintiff will only be entitled to prejudgment simple interest at the rate of six percent per annum pursuant to this Court's order of July 27, 1978, and, because of modern interest rates, will suffer daily financial losses from nonpayment of these liquidated debts. *United Bank of Pueblo v. Hartford Accident & Indemnity Co.*, 529 F.2d 490 (10th Cir. 1976). Since several millions of dollars are owed by the defendant, great injustice would result from further delay. In fact, because of the complex nature of the remaining claims in this case, the delay in payment which would occur if certification is denied would span many months, if not years.

The solvency of the parties is not a factor weighing heavily either against or in favor of Rule 54(b) certification under the circumstances of this case. Both the plaintiff and the defendant appear to be financially sound. Therefore, plaintiff's financial condition is such that it would be able to await the payment of these sums, and defendant's economic status is such that defendant will be able to satisfy the judgment whenever final judgment is entered. However, it is likewise true that defendant is able to pay now without awaiting the adjudication of its counterclaims for use as a possible setoff, and that plaintiff will be able to satisfy a judgment in favor of defendant on the counterclaims whenever such judgment is entered.

Letter Opinion Filed July 27, 1978

Although the presence of defendant's counterclaims and the consequent possibility of a setoff recovery are factors weighing against certification, the Court is of the opinion that such is outweighed in this case by considerations favoring Rule 54(b) certification. After balancing all of the factors as outlined above, it appears that there is no just reason for delay and that final judgment should be entered under Rule 54(b) encompassing the orders of February 24, 1978, and July 27, 1978. Accordingly, on this date, I have signed an order to this effect.

s/ James A. Coolahan
James A. Coolahan
U.S. Senior District Judge

Original filed with
Clerk of the Court

ORDER OF FINAL JUDGMENT, ENTERED JULY 28, 1978

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 76-794

[TITLE OMITTED]

This matter having been opened to the Court upon the motion of plaintiff, Curtiss-Wright Corporation, for an order granting Rule 54(b) certification of this Court's orders of February 24, 1978, and July 27, 1978, which awarded to plaintiff summary judgment and prejudgment interest upon counts 17 and 18 of the Amendment to and Supplemental Complaint, and the Court having considered the moving papers and briefs submitted by the parties, and good and sufficient cause having been shown, for the reasons set forth in this Court's letter opinion filed this day,

It is, on this 27th day of July, 1978,

ORDERED that final judgment be entered under Rule 54(b) encompassing the orders of February 24, 1978, and July 27, 1978, there being no just reason for delay.

s/ James A. Coolahan
U.S.D.J.

NOTICE OF APPEAL FROM ORDER OF FINAL JUDGMENT ENTERED JULY 28, 1978

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 76-794

(Hon. James A. Coolahan)

[TITLE OMITTED]

Defendant General Electric Company hereby appeals to the United States Court of Appeals for the Third Circuit from the Order of final judgment entered July 28, 1978, and the interlocutory Orders dated February 24, 1978, and July 27, 1978, subsumed therein.

COLE AND GRONER, P.C.

By Isaac N. Groner
ISAAC N. GRONER
WALTER H. FLEISCHER
ALFRED F. BELCUORE

1730 K Street, N.W.
Washington, D.C. 20006
Telephone: (202) 331-8888

HANNOCH, WEISMAN, STERN
& BESSER

By Albert G. Besser
ALBERT G. BESSER

Notice of Appeal Entered July 28, 1978

744 Broad Street
Newark, New Jersey 07102
Telephone: (201) 621-8800

Attorneys for Defendant
General Electric Company

Dated: August 3, 1978

Clerk please serve:

Ralph N. Del Deo, Esquire
Crummy, Del Deo, Dolan & Purcell
Gateway I
Newark, New Jersey 07102

Attorneys for Plaintiff
Curtiss-Wright Corporation

ORDER GRANTING DEFENDANT'S APPLICATION FOR STAY OF JUDGMENT, FILED AUGUST 3, 1978

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 76-794

(Hon. James A. Coolahan)

[TITLE OMITTED]

This matter having come before the Court on the Application of Defendant General Electric Company for Stay of Judgment Without Bond, and the Court having considered the papers submitted by the parties and heard the argument of counsel, and Defendant having shown that its financial position is sufficient to secure this judgment while Defendant pursues its appeal, it is on this 3rd day of August, 1978,

ORDERED, that the Court finds and approves that the financial position of Defendant General Electric Company is sufficient to provide unquestionable security for Plaintiff; and it is

FURTHER ORDERED, that no bond need be given by Defendant General Electric Company to secure this judgment pending this appeal; and it is

FURTHER ORDERED, that this Court's Order of final judgment entered July 28, 1978, and the interlocutory Orders dated February 24, 1978, and July 27, 1978, subsumed therein, be, and the same hereby are, stayed until final resolution of the appeal therefrom by the Defendant General Electric Company to the United States Court of Appeals for the Third Circuit.

s/ James A. Coolahan
JAMES A. COOLAHAN
SENIOR UNITED STATES
DISTRICT JUDGE

SUPPLEMENTAL AFFIDAVIT OF E.A. KLEIN, FILED AUGUST 22, 1978

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 76-794

(Hon. James A. Coolahan)

[TITLE OMITTED]

STATE OF NEW YORK)
) SS:
COUNTY OF SCHENECTADY)

E.A. KLEIN, being duly sworn, deposes and states:

1. I am the Manager of Procurement Operations of the Machinery Apparatus Operation ("M.A.O.") of Defendant General Electric Company ("G.E."). I have previously submitted an Affidavit in this action dated April 14, 1978. I submit this Supplemental Affidavit in support of G.E.'s Motion for Summary Judgment on Count 19 of the Additional Supplemental Complaint of Plaintiff Curtiss-Wright Corporation ("Curtiss-Wright") and in opposition to Curtiss-Wright's Motion for Summary Judgment with Prejudgment Interest on Count 19 of the Additional Supplemental Complaint.

2. Each of the nine purchase orders that are the subject of Count 19 of Curtiss-Wright's Additional Supplemental Complaint contains the following two clauses:

> "[N]o payment by Buyer [G.E.] shall be due until thirty (30) days after (1) receipt of an acceptable invoice and appropriate evidence that Seller

[Curtiss-Wright] has met all requirements of the order, or (2) receipt of the supplies at destination, whichever last occurs." Terms and Conditions of Purchase, Article 5a.

"Seller [Curtiss-Wright] and each assignee under an assignment in effect at the time of final payment agree as a condition precedent to final payment, that the Buyer and the Government, their respective officers, agents and employees are released from all liabilities, obligations and claims arising under or by virtue of this order. Seller further agrees that the final invoice shall constitute no less than ten percent (10%) of the total order price." Terms and Conditions of Purchase, Article 5c.

3. Each of these nine purchase orders, as well as each of the 12 purchase orders, with the exception of B-429, that are the subject of Counts 17 and 18 of Curtiss-Wright's Amendment To And Supplemental Complaint, contains the following standard form final invoicing instructions:

> "The final invoice(s) shall be marked 'FINAL' on the face of the invoice to signify billing is complete under this Order and that all claims on this Order against General Electric Company M.A.O. and/or the Government have been resolved."

4. As Mr. Sullivan stated in his Fourth Supplemental Affidavit dated July 17, 1978 (Paragraph 4), each final invoice submitted by Curtiss-Wright for these nine purchase orders was accompanied by a qualified release purporting to release G.E. and the Government from all claims except those which are the

subject of this action. Curtiss-Wright has never submitted an "acceptable invoice" for these nine purchase orders.

5. Subsequent to the filing of Mr. Sullivan's Fourth Supplemental Affidavit, I discussed with Mr. Sullivan the dates on which final payment to Curtiss-Wright would have been due if Curtiss-Wright had complied with Articles 5a and 5c and had submitted an acceptable invoice. We agreed that final payment on the nine purchase orders that are the subject of Count 19 of Curtiss-Wright's Additional Supplemental Complaint would have been due, in the amounts indicated, on the following dates, had Curtiss-Wright not attempted to qualify its release of G.E. and the Government while seeking final payment:

Purchase Order	Date Payment Due	Amount of Final Payment
B-451	January 26, 1977	$ 292,564
B-452	January 19, 1977	2,543,020
B-428	January 26, 1977	496,519
A-641	May 15, 1978	553,506
A-656	May 21, 1977	1,436,144
A-661	July 19, 1978	1,144,786
A-675	May 15, 1978	1,831,466
B-478	June 2, 1978	1,370,817
A-113	August 14, 1978	867,050

6. Therefore, in accordance with this Court's Opinions of December 5, 1977, and June 20, 1978, the total final payment due Curtiss-Wright on the nine purchase orders that are the subject of Count 19 of the Additional Supplemental Complaint is $10,535,872, with simple prejudgment interest at six percent per annum to be calculated with respect to each purchase order from the dates specified above.

s/ E.A. Klein
E.A. KLEIN

Sworn to August 21st, 1978.

ADDITIONAL SUPPLEMENTAL COMPLAINT FILED AUGUST 28, 1978

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

(Hon. James A. Coolahan)

Civil Action No. 76-794

[TITLE OMITTED]

Plaintiff, for its Additional Supplemental Complaint, alleges as follows:

NINETEENTH COUNT

135. Plaintiff repeats and realleges all of the allegations contained in Paragraphs 1 through 7 of the Complaint in this action as if set forth at length herein.

136. From on or about early in 1968 through 1972, on various occasions, plaintiff and defendant entered into a series of 21 contracts pursuant to which plaintiff entered into the business of manufacturing nuclear components and performing related work for the defendant, for the aggregate sum of $214,600,000.00 which defendant agreed to pay plaintiff.

137. To date, plaintiff has performed all of the terms and conditions of those contracts designated as Purchase Order Nos. B-451, B-452, B-428, A-641, A-656, A-661, A-675, B-478, and A-113 on its part to be performed.

138. The balance due on account of the price stipulated in said Purchase Orders, after crediting all progress payments made, is the sum of $10,535,872.00 over and above such unliquidated additional amounts as may be found to be due

plaintiff thereon under the foregoing Counts of the Complaint in this action.

139. Defendant has not paid said sum of $10,535,872.00 to plaintiff or any part thereof, although demand therefor has been made.

WHEREFORE, plaintiff demands judgment against defendant on this Count for the sum of $10,535,872.00, interest and costs.

CRUMMY, DEL DEO, DOLAN
& PURCELL
Attorneys for Plaintiff

s/ Ralph N. Del Deo
Ralph N. Del Deo

Date: August 28, 1978.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT WITH PREJUDGMENT INTEREST ON THE ADDITIONAL SUPPLEMENTAL COMPLAINT, AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON THE ADDITIONAL SUPPLEMENTAL COMPLAINT, FILED AUGUST 29, 1978

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

(Hon. James A. Coolahan)

Civil Action No. 76-794

[TITLE OMITTED]

This matter having been opened to the Court upon (1) plaintiff's motion pursuant to Rule 15(d) of the Federal Rules of Civil Procedure to file an Additional Supplemental Complaint (19th Count), (2) plaintiff's motion pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment with prejudgment interest on the 19th Count of the Additional Supplemental Complaint, (3) defendant's cross-motion pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment on the 19th Count of the Additional Supplemental Complaint, and defendant having made no objection to plaintiff's motion to file the Additional Supplemental Complaint, and the parties having agreed that the rulings of this Court as set forth in the Court's Opinions filed December 5, 1977, and June 20, 1978, with regard to the Amendment To And Supplemental Complaint in this action are dispositive of the issues raised by the cross-motions for summary judgment on the 19th Count of the Additional Supplemental Complaint, and the parties having further agreed upon the dates from which prejudgment interest shall run as to the nine (9) purchase orders enumerated in the 19th Count of the Additional Supplemental Complaint, and good and sufficient cause having been shown,

Order Filed August 29, 1978

It is on this 29 day of August, 1978,

ORDERED:

1. That plaintiff's motion to file an Additional Supplemental Complaint be and the same is hereby granted;

2. That plaintiff's motion for summary judgment on the 19th Count of the Additional Supplemental Complaint in the amount of $10,535,872.00 be and the same is hereby granted, and any acceptance by Plaintiff of payment from Defendant pursuant to this Order will not operate to release Defendant and the Government, their officers, agents and employees from (1) the other claims of Plaintiff that are presently the subject of this law suit, (2) any other claim of Plaintiff as to any contract not listed in paragraph 137 of the Additional Supplemental Complaint or paragraphs 127 and 132 of the Amendment To And Supplemental Complaint, and (3) any claim of Plaintiff for final payment under any contract which is not listed in paragraph 137 of the Additional Supplemental Complaint or paragraphs 127 and 132 of the Amendment To And Supplemental Complaint.

3. That Plaintiff's motion for an award of prejudgment interest on the 19th Count of the Additional Supplemental Complaint be and the same is hereby granted, and prejudgment simple interest at the rate of six percent per annum shall run from the following dates with respect to each of the nine (9) purchase orders enumerated in the 19th Count of the Additional Supplemental Complaint:

Order Filed August 29, 1978

Purchase Order	Date Interest Begins to Run
B-451	January 26, 1977
B-452	January 19, 1977
B-428	January 26, 1977
A-641	May 15, 1978
A-656	May 21, 1977
A-661	July 19, 1978
A-675	May 15, 1978
B-478	June 2, 1978
A-113	August 14, 1978

4. That defendant's motion for summary judgment on the 19th Count of the Additional Supplemental Complaint be and the same is hereby denied.

s/ James A. Coolahan
JAMES A. COOLAHAN, U.S.D.J.

Consented to as to Form;

CRUMMY, DEL DEO, DOLAN & PURCELL
Attorneys for Plaintiff,
Curtiss-Wright Corporation

s/ Ralph N. Del Deo
Ralph N. Del Deo

HANNOCH, WEISMAN, STERN & BESSER
Attorneys for Defendant,
General Electric Company

s/ Albert G. Besser (JJF)
Albert G. Besser

Order Filed August 29, 1978

COLE AND GRONER, P.C.
Attorneys for Defendant,
General Electric Company

s/ Isaac N. Groner (JJF)
Isaac N. Groner

ORDER OF FINAL JUDGMENT ENTERED AUGUST 31, 1978

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 76-794

(Hon. James A. Coolahan)

[TITLE OMITTED]

This matter having been opened to the Court upon the motion of plaintiff, Curtiss-Wright Corporation, for an Order granting Rule 54(b) certifiction of this Court's Order of August 29, 1978, which awarded to plaintiff summary judgment and prejudgment interest upon Count 19 of the Additional Supplemental Complaint, and good and sufficient cause having been shown, for the reasons set forth in this Court's letter opinion filed July 27, 1978,

It is on this 29th day of August, 1978,

ORDERED, that final judgment be entered under Rule 54(b) encompassing the above referenced Order of August 29, 1978, there being no just reason for delay.

s/ James A. Coolahan
JAMES A. COOLAHAN,
U.S.D.J.

Consented to as to Form:

CRUMMY, DEL DEO, DOLAN & PURCELL
Attorneys for Plaintiff, Curtiss-Wright Corporation

s/ Ralph N. Del Deo
Ralph N. Del Deo

HANNOCH, WEISMAN, STERN & BESSER
Attorneys for Defendant, General Electric Company

s/ Albert G. Besser (JJF)
Albert G. Besser

COLE AND GRONER, P.C.
Attorneys for Defendant, General Electric Company

s/ Isaac N. Groner (JJF)
Isaac N. Groner

NOTICE OF APPEAL FROM ORDER OF FINAL JUDGMENT ENTERED AUGUST 31, 1978

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 76-794

(Hon. James A. Coolahan)

[TITLE OMITTED]

Defendant General Electric Company hereby appeals to the United States Court of Appeals for the Third Circuit from the Order of final judgment filed August 29, 1978, and the interlocutory Order filed August 29, 1978, subsumed therein.

COLE AND GRONER, P.C.

s/ Isaac N. Groner
ISAAC N. GRONER
WALTER H. FLEISCHER
ALFRED F. BELCUORE

1730 K Street, N.W.
Washington, D.C. 20006
Telephone: (202) 331-8888

HANNOCH, WEISMAN,
STERN
& BESSER, P.A.

s/ Albert G. Besser
ALBERT G. BESSER

744 Broad Street
Newark, New Jersey 07102
Telephone: (201) 621-8800

Attorneys for Defendant
General Electric Company

Notice of Appeal Entered August 31, 1978

Dated:

September 13, 1978

Clerk please serve:

Ralph N. Del Deo, Esquire
Crummy, Del Deo, Dolan & Purcell
Gateway I
Newark, New Jersey 07102

Attorneys for Plaintiff
Curtiss-Wright Corporation

OPINION OF THE THIRD CIRCUIT COURT OF APPEALS, FILED APRIL 17, 1979

UNITED STATES COURT OF APPEALS

FOR THE THIRD CICRUIT

Nos. 78-2179 and 78-2293

CURTISS-WRIGHT CORPORATION,

v.

GENERAL ELECTRIC COMPANY,

Appellant.

(D.C. Civil No. 76-0794)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued March 22, 1979

Before SEITZ, *Chief Judge,* ALDISERT and ROSENN, *Circuit Judges.*

(Opinion filed April 17, 1979)

Opinion Filed April 17, 1979

Isaac N. Groner, Esquire
(argued)
Walter H. Fleischer, Esquire
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(argued)
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Gateway 1
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Attorneys for Appellee

Opinion Filed April 17, 1979

OPINION OF THE COURT

PER CURIAM.

In a diversity action by Curtiss-Wright Corp. (Curtiss) against General Electric Company (GE), the district court granted summary judgment to Curtiss on its claims for outstanding balances due on contracts with GE; additional claims arising out of the contractual relationship have not yet been adjudicated. The district court certified that the judgments were final under Rule 54(b) of the Federal Rules of Civil Procedure.

GE appealed the 54(b) judgments. It first contends that the entry of the 54(b) certifications was not consistent with a sound exercise of discretion, and thus requests this court to dismiss the appeals without consideration of the merits.

Curtiss, as subcontractor, entered into 21 subcontracts with GE, prime contractor for the Navy, to build component parts for propulsion systems on nuclear vessels for about $215 million. Most of the claims asserted by Curtiss were based on alleged fraud and misrepresentation by GE which caused cost overruns and prevented Curtiss from making a profit. Three of Curtiss's claims sought payment from GE on the outstanding balances due on the 21 subcontracts. GE counterclaimed for $60 million in costs incurred by it due to Curtiss's alleged failure to perform its contractual obligations competently.

The district court granted summary judgment on the claims for the amount of the outstanding balances and directed GE to pay Curtiss $19 million along with prejudgment interest. It further directed that such judgments were final under Rule 54(b) and stated its reasons for such action.

Opinion Filed April 17, 1979

GE asserts that the entry of the 54(b) certifications under the circumstances of this case was in direct conflict with the rules announced by this court in *Allis-Chalmers Corp.* v. *Philadelphia Electric Co.*, 521 F.2d 360 (3d Cir. 1975). We address that contention.

In *Allis-Chalmers* this court stressed that certification should be the exception rather than the rule, and delineated illustrative factors governing the trial court's discretion in certifying a judgment as final under 54(b). 521 F.2d at 364. We went on to state:

> In the absence of unusual or harsh circumstances,[14] we believe that the presence of a counterclaim, which could result in a set-off against any amounts due and owing to the plaintiff, weighs heavily against the grant of 54(b) certification.

Id. 366. Footnote 14 to the quoted sentence defined unusual or harsh circumstances as those factors "involving considerations of solvency, economic duress, etc."

The district court addressed the general requirements of *Allis-Chalmers* as they applied to this case, stating that the certification would not result in duplicative appellate review because the claims for final payment were totally distinct from the other issues in the case. It felt for the same reasons that the proceedings in the district court could continue pending the appeal and would not moot any determination of the merits of this appeal. The district court also felt that justice in this litigation would be served by certification because Curtiss would suffer daily financial losses from its inability to achieve a greater return on the $19 million judgment than the 6% interest authorized by New York law. The court also concluded that GE could

afford to pay and that Curtiss would be able to repay the funds if GE succeeded on its counterclaims.

[We turn to an examination of the reasons given by the district court for certifying these judgments. The first reason given was that certification would not result in a duplication of issues to be resolved after final judgment on all the claims. While this may be so, it is also entirely possible that there will be no need to decide the merits of this appeal if an appeal is taken from the final determination of all claims and counterclaims in this case. We say this because GE represents that the single issue it raises on the merits here will not be raised after final judgment.]*

The practical consideration here is that the court is being asked to say who should have the benefit of the money until the litigation is finally resolved. We think that *Allis-Chalmers* dictates that the matter remain in status quo when non-frivolous counterclaims are pending, and in the absence of unusual or harsh circumstances.

Finally, and of decisive significance, it is tacitly conceded that the only harsh circumstance presented here is Curtiss's inability to use the money from the judgment. The result is indeed harsh from Curtiss's viewpoint, but what if GE prevails on its compulsory counterclaim? How is its loss resulting from the deprivation of the money to be restored? In any event this factor was rejected as controlling in *Allis-Chalmers*. Indeed, this was the primary basis for the dissent in *Allis-Chalmers*. *See* 521 F.2d at 367 (Gibbons, J., dissenting). As a three judge panel, we

* Portions in [] were subsequently modified by orders of the Court. See App. at 243a.

are bound to apply *Allis-Chalmers* here. *See* Third Circuit Internal Operating Procedures, Chapt. VIII, C.

The appeal will be dismissed for want of an appealable order with a direction to the district court to vacate so much of its judgment as purported to render a final judgment pursuant to Rule 54(b). Each party shall bear their own costs.

ROSENN, *Circuit Judge*, Dissenting

I respectfully dissent because I believe that the district court's certification of this appeal under Rule 54(b), Fed. R. Civ. P., was not an abuse of discretion.

Curtiss-Wright Corporation ("Curtiss-Wright") entered into twenty-one subcontracts to deliver components to General Electric Company ("GE"), a prime contractor for the United States, for eventual use in the construction of nuclear naval vessels. In connection with these contracts, Curtiss-Wright brought a suit against GE in which Curtiss-Wright sought damages and reformation of the subcontracts, alleging fraud, misrepresentation, and contractual breaches by the defendant. GE then withheld the final payments to Curtiss-Wright for the material manufactured and supplied by Curtiss-Wright, and GE interposed counterclaims alleging that Curtiss-Wright had failed to perform competently, and that as a consequence GE was required to render it extraordinary assistance. Curtiss-Wright then added to its complaint three counts seeking the final payments that GE had held back.

Although it is conceded that Curtiss-Wright had manufactured and delivered to GE the components for which the

final payments were claimed, and GE did not object to the quality of the parts, GE refused to make the payments.[1] In this refusal, GE relied on a contractual provision which, as GE interposed it, conditioned the final payments on Curtiss-Wright's release of all claims against GE. Because Curtiss-Wright was suing GE for fraud, misrepresentation, and contractual breaches, it would not assent to any such release. Applying the law of New York in this diversity suit, the district court ruled that, notwithstanding the contractual provision on which GE rested its argument, Curtiss-Wright was entitled to judgment on its claims for the final payments. The partial summary judgment won by Curtiss-Wright amounted to nearly 19 million dollars. The district court then certified its judgment for immediate appeal, while retaining jurisdiction over Curtiss-Wright's other claims and GE's counterclaims.

In *Allis-Chalmers Corp.* v. *Philadelphia Electric Co.*, 521 F.2d 360 (3d Cir. 1975), this court set out several considerations that a district court should take into account when it rules upon a motion for certification under Rule 54(b). Unless, in weighing these factors, the district court has abused its broad discretion, we may not disturb its decision in favor of certification. *Id.* at 367 n.16. *See Sears Roebuck & Co.* v. *Mackey*, 351 U.S. 427, 437 (1956). The Rule "defines finality in terms of what the district

[1] It is undisputed that as of September 23, 1976, Curtiss-Wright had made and General Electric had accepted delivery of all of the large components called for by twelve of the twenty-one subcontracts which formed the basis for the district court's partial summary judgment. By August 28, 1978, GE had accepted delivery of the parts manufactured by Curtiss-Wright under the remaining nine subcontracts.

court does and gives this court broad discretion in applying finality." 6 Moore's Fed. Practice ¶ 54.28[1].[2]

In my judgment, the trial judge identified two considerations of sufficient gravity to justify his exercise of discretion. First, Judge Coolahan noted an economic consideration favoring immediate appeal. *See Allis-Chalmers Corp.* v. *Philadelphia Electric Co., supra* 521 F.2d at 364. He concluded that Curtiss-Wright, under New York law, can recover prejudgment interest of only six percent. The interest on the award already granted by the district court will continue in the face of the high cost of money to accrue at this comparatively low rate until Curtiss-Wright can execute on its judgment. If this court were to hear the appeal certified by the district court and to sustain the district court's judgment, Curtiss-Wright could execute immediately. Because of the disparity between six percent simple interest and the much higher interest rates now prevalent in the marketplace, Curtiss-Wright will lose (as GE conceded at oral argument) over ε million dollars per

[2] Because federal rules provide extensively for the presentation of numerous claims that are often diverse, unrelated, and involve multiple parties, "it was highly desirable that the district court be given broad powers to enter separate judgments. . . ." 6 Moore's Fed. Practice ¶ 54.22. The Rule gives the trial judge the necessary elasticity because he has firsthand information as to the litigation, its progress, and the timeliness for a separate judgment and appellate review. He is in "an excellent position to determine from the standpoint of justice to the litigants the best time at which to terminate by final judgment of the litigation with respect to a single claim in the multiple claims suit and thus to open the way to immediate appellate review and execution of judgment." Bendix Aviation Corp. v. Glass, 195 F.2d 267, 272 (3d Cir. 1951) (Maris, J.).

year until this litigation can be finally consummated. This could conceivably take years to complete.[3]

The Tenth Circuit accepted a similar argument in *United Bank of Pueblo* v. *Hartford Accident & Indemnity Co.*, 529 F.2d 490 (10th Cir. 1976). The court considered a delay as brief as ten months in collecting a judgment, although very much smaller than the one *sub judice,* to constitute "a financial injustice" in the face of a high interest rate in the market. *Id* at 493. Judge Coolahan cited that case in support of his certification.

The prediction about Curtiss-Wright's losses assumes that if Curtiss-Wright's judgment were satisfied now, the company, by outside investment of the proceeds, could secure a rate of return approximating the interest available in the market. But Curtiss-Wright might have, as it indicated at oral argument, a more efficient use for the money if it devoted the 19 million dollars to its own operations. Even for a large corporation, such as Curtiss-Wright, a block of capital as great as this can play a significant part in the operations of the economy.

This is not to say the district court should certify every money judgment carrying prejudgment interest of less than the market rate. Such a conclusion would conflict with *Allis-Chalmers,* which suggested that a district court ascertain whether the action before it is "the infrequent harsh case" warranting certification. But when the judgment is for a very large sum of money, and the current

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[3] The district court also noted that "because of the complex nature of the remaining claims in this case, the delay in payment which would occur if certification is denied would span many months, if not years." He concluded that "great injustice would result from further delay."

cost of money is exceptionally high, the substantial loss to the creditor caused by further delay must be weighed by the court. In assessing economic considerations, a district court should weigh the size of the judgment, the degree of disparity between market interest and prejudgment interest, and the importance of the award for the prevailing party, as well as the other considerations recognized by *Allis-Chalmers.*[4] In this case, the district court touched all of these bases.

In putting aside the district court's careful considerations, the majority stresses the existence of GE's counterclaims. It relies on the passage in *Allis-Chalmers* that the presence of a counterclaim, in the absence of unusual or harsh circumstances, "weighs heavily against the grant of 54(b) certification." 521 F.2d at 366. But note 14 of that opinion suggested, without limitation, that "unusual or harsh circumstances" referred to "considerations of solvency, economic duress, etc." In the present case, the majority notes that GE's counterclaims are not frivolous, and it argues that the district court identified no "unusual or harsh circumstances" justifying certification. The disparity of interest rates, it urges, cannot constitute "unusual or harsh circumstances" because "this factor was rejected as controlling in *Allis-Chalmers.*" By this statement the majority evidently means that, despite the presence of losses due to interest rates, *Allis-Chalmers* allowed the posibility that certification there might have been improper. I disagree with the majority's analysis about the effect of GE's counterclaims.

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[4] Even if *Allis-Chalmers* did not develop the contours of the meaning of "economic considerations," 521 F.2d at 364, that opinion observed that it did not exhaust the catalog of factors. 521 F.2d at 364 n.6.

Allis-Chalmers did not hold that the deprivation of the use of money would never constitute "unusual or harsh circumstances" outweighing the existence of counterclaims. Indeed, the majority in *Allis-Chalmers* never even reached the *merits* of the district court's certification; it focused only on the mischief of unbridled certifications and the necessity for a statement of reasons by the district court when it grants a 54(b) certification:

> Notwithstanding the stridency of the dissent, our holding is not that this was an improper case for Rule 54(b) certification. We have remanded *only* for a *statement of reasons* so that this court may properly determine if this was "the infrequent harsh case" warranting final certification. . . .
>
> We express no opinion on the dissent's analysis of the factors to be considered by the district court because, in the view we take, that is a proper function for the district court. Our consideration of such factors is only to determine whether the district court abused its discretion in granting final certification.

Allis-Chalmers Corp. v. *Philadelphia Electric Co., supra* 521 F.2d at 367 n.16 (original emphasis).

Nothing in *Allis-Chalmers* forecloses the conclusion that it would be unreasonable—even harsh—to prevent Curtiss-Wright's use of the proceeds from a 19 million dollar judgment. The district court properly examined the size and importance of Curtiss-Wright's prospective losses. In this connection, one should not minimize the effect, even upon a large corporation, of a deprivation of the use of almost 19 million dollars in operating capital since September 1976, especially during an inflationary period and in a tight money market.

It is true, as the majority contends, that GE may ultimately prevail on its counterclaims and that, in this event, GE and not Curtiss-Wright would have suffered the deprivation of 19 million dollars during the interim. It is also true, however, that GE may fail in its counterclaims, so that the disadvantage would be placed on Curtiss-Wright. Unlike the majority, I do not read *Allis-Chalmers* to dictate "that the matter remain in status quo when non-frivolous counterclaims are pending." Rule 54 gives the district court discretion, it seems to me, to consider the size of the loss due to a disparity in interest rates, the indefinite deprivation of substantial working capital advanced in behalf of GE, and the consequent importance for the litigants.

In the context of Rule 54(b), which contemplates that delay in reviewing partial judgments may be harmful and oppressive, our standard of review is limited to ascertaining whether the district court abused its discretion when it certified "there is no just reason for delay" and directed the entry of final judgment upon three of the claims aggregating approximately 19 million dollars. This court may not and should not substitute its judgment for that of the district court. *Allis-Chalmers* only directs the district court to articulate its reasons when it directs the entry of a final judgment on fewer than all the claims. Our review function on the certification should be merely an inquiry as to whether the justification proffered has a reasonable basis.

In any event, the passage from *Allis-Chalmers* concerning counterclaims does not designate the existence of a

counterclaim as absolutely decisive, even in the absence of harsh circumstances. Otherwise, the assertion of any counterclaim, even one contrived, would defeat the possibility of certifying an appeal under Rule 54(b), a situation hardly contemplated by the authors of the Rule. [*Allis-Chalmers* only prescribed that the district court weigh a counterclaim "heavily." There is in the present case, however, a second factor that both establishes the harshness of circumstances here and has an independent significance to be balanced against the counterclaims.

Although the district court stated unequivocally that the issues to be reviewed in a certified appeal would not duplicate any of the issues raised by the remaining claims and noted that certification would not entail unnecessary appellate review[5] the majority asserts that if this appeal

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[5] Judge Coolahan concluded that certification would not in any way result in unnecessary appellate review.

> The claims which have been finally adjudicated are separate, distinct, and independent of any of the other claims or counterclaims involved in this lawsuit. Plaintiff's other claims generally seek recovery for alleged cost overruns and lost profits, and defendant's counterclaim generally seek to recover for the costs of alleged technical assistance provided by the defendant to the plaintiff. For this reason, certification should not prevent the rest of this case from being prepared for trial. Also, because of the above, the need for review will not be mooted by any future developments in the District Court. The determinations by the District Court regarding the claims sought to be certified under Rule 54(b) are final and will not be changed by later developments in the District Court. Furthermore, because of the nature of the claims which are involved, the appellate courts will not need to decide the same issues more than once even if two appeals arise out of this case.

is dismissed, the issues now presented may no longer exist in an appeal from a later judgment on the whole case. The basis for this possibility lies in the nature of Curtiss-Wright's contract claims for the final payments. GE is resisting the claims on the sole ground that Curtiss-Wright still has other claims outstanding against it. When Curtiss-Wright has litigated all of these other claims, GE will acknowledge the 19 million dollar debt it owes Curtiss-Wright.

But suppose, as the district court concluded, that New York law rejects GE's interpretation of the contractual provision on which GE relies in resisting payment. Waiting for this contract issue to disappear in a later appeal would be effectively to enforce GE's incorrect view of New York law. GE contends that, by virtue of its contract as interpreted under the law of New York, the company may delay its final payments until all other claims against it have been resolved. Because the court dismisses this appeal as improperly certified, this contract issue will indeed vanish. But the reason will be that, even though the law of New York rejects GE's asserted right to delay payment, GE will have achieved fully by our preclusion of the appeal what it sought through its argument on the merits.[6]

I do not mean to suggest that this result would violate the rule of *Erie Railroad Co.* v. *Tompkins,* 304 U.S. 64 (1938), which requires federal courts, sitting in diversity, to apply state substantive law. I do mean to say that the danger of an oblique victory for GE's contract defense,

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[6] Although under *Allis-Chalmers,* the possibility that a claim may be mooted counts against certification, *Allis-Chalmers* refers to a dif-

(Footnote continued on following page)

Opinion Filed April 17, 1979

accomplished by the preclusion of this appeal, bears on whether the district court abused its discretion in certifying the judgment under Rule 54(b).]*

Being persuaded that the district court did not abuse its discretion, I would reach the merits of the contract issue. For the reasons so well expressed in the district court's opinion, I would sustain the summary judgment in favor of Curtiss-Wright.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(Footnote continued from preceding page)

ferent sense of mootness from that involved here. *See* Allis-Chalmers Corp. v. Philadelphia Electric Co., *supra* 521 F.2d at 364 & n.8. On the issue of mootness *Allis-Chalmers* cited Panichella v. Pennsylvania R.R. Co., 252 F.2d 452, 455 (3d Cir. 1958), in which the district court certified a claim asserted by the defendant against a third party. As the court, in *Panichella* wrote, "the third-party claim is so completely incidental to and dependent upon the principal claim that there can be no recovery upon the third-party claim unless the plaintiff shall prevail on the principal claim." *Id.* If, in *Panichello,* the third-party claim became moot, the parties litigating the claim would have lost nothing by the delay in review, and judicial resources would be conserved. Decision on the mooted claim could truly be avoided. Here, by contrast, the delay in review hurts Curtiss-Wright, because the basis of mootness will be that GE, through the delay, will have already gained the very point it seeks in its substantive argument. This court, in effect, will not avoid decision on the mooted claim; it will have effectively decided the claim in favor of GE.]*

*** Portions in [ ] were subsequently modified by order of the Court. See App. at 244a, 245a.**

APPELLANT'S MOTION TO AMEND THE OPINION OF THE THIRD CIRCUIT COURT OF APPEALS, FILED MAY 1, 1979

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-2179
No. 78-2293

CURTISS-WRIGHT CORPORATION,

Appellee,

v.

GENERAL ELECTRIC COMPANY,

Appellant.

APPELLANT'S MOTION TO AMEND OPINION OF COURT

Appellant General Electric Company, attaching hereto the transcript of the oral argument, respectfully moves the Court to amend its Opinion of April 17, 1979, by the excision of the final sentence in the first full paragraph on page 4 of its Slip Opinion: "We say this because GE represents that the single issue it raises on the merits here will not be raised after final judgment." It is respectfully submitted that, as the preceding sentence of the Court Opinion states, the pertinent colloquy between the Bench and counsel for G.E. concerned the possibility or likelihood that the issue would not be raised, and did not include or request any representation that the issue on the merits would not be raised by G.E. under any circumstances.

The pertinent portions of the argument follow (transcript attached, pp. 11-12, emphasis added):

"THE COURT: May I ask you a question. I may be way off base, so don't hesitate to tell me so, if this present appeal is not allowed, will that issue still be a live issue after the case is completely disposed of in the District Court?

"MR. GRONER: That issue should not arise. It might depend on the exact circumstances, but presumably, the decision in the District Court, but unless there were appeals, presumably, the decision in the District Court would be a final adjudication of all claims and would enable —

"THE COURT: I'm postulating that.

"MR. GRONER: Then, it would enable, Your Honor, the submission of a release of all claims, based upon the carrying out of the judgment of the District Court and, therefore, would satisfy the condition precedent.

"THE COURT: Right. So that it's *possible* that if this appeal is not allowed, that this Court will never have to face the issue now briefed as point two; is that right?

"MR. GRONER: Yes, Your Honor, in our view, that is correct."

In short, we believe that the discussion at oral argument does not reflect that any representation was made that the issue "will not be raised after final judgment"; but it is precisely consonant with the Court's statement that "it is also *entirely possible* that there will be no need to decide the merits of this

appeal if an appeal is taken from the final determination of all claims and counterclaims in this case" (Slip Op. 4; emphasis added).

While we did point out that Curtiss-Wright presumably would be in a position at the end of the litigation to provide a release, and that final payment could be made at that time, we did not mean to suggest that the issue of whether Curtiss-Wright has failed at this time to meet a condition precedent to final payment will necessarily be moot at the end of the litigation, or that G.E. might not in some circumstances have to litigate the point further on appeal. At the end of the litigation, as noted, Curtiss-Wright would be in a position to give a conforming release and hence to receive final payment. However, the issue of whether Curtiss-Wright is owed any interest for the interim period until that release is given conceivably could be disputed at the end of the litigation. It is G.E.'s present position that Curtiss-Wright is not so entitled to interest because it has not met a condition precedent to payment and its right to the monies at issue therefore has not accrued. This is the G.E. position on the merits of the appeal which counsel made clear G.E. was relying upon if the appeal were not to be dismissed (*e.g.*, transcript attached, pp. 32-33).

It was G.E.'s position that the appeal should be dismissed, whether or not the same issues might be raised on the ultimate appeal, because of the overriding policy against interlocutory appeals as clearly elucidated in *Allis-Chalmers Corp. v. Philadelphia Electric Co.*, 521 F.2d 360 (3rd Cir. 1975) ("*Allis-Chalmers*"). Because the counterclaim was compulsory and for other reasons, in relation to *Allis-Chalmers*, this case *a fortiori* requires the holding that the appeals should be dismissed for want of an appealable order and direction to the District Court to vacate so much of its judgment as purported to render a final judgment pursuant to Rule 54(b).

Motion Filed May 1, 1979

The Opinion of the Court plainly rested upon the legal identity between this case and *Allis-Chalmers;* and excision of the sentence, it is respectfully submitted, would affect neither the reasoning nor the Judgment of the Court. The discussion of the factors involved, including the final factor held to be "of decisive significance" (Slip Op. 4), would lose none of its manifest validity. The Opinion of the Court, if this Motion were granted, would still of course amply discuss the grounds relied upon by the District Court in its attempt to distinguish *Allis-Chalmers* and persuasively demonstrate that those grounds are not sustainable.

For the reasons stated herein, Appellant General Electric Company prays the Court to excise the final sentence in the first full paragraph on page 4 of its Slip Opinion.

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RESPONSE OF APPELLEE, CURTISS-WRIGHT CORPORATION, TO APPELLANT'S MOTION TO AMEND THE OPINION, FILED MAY 10, 1979

IN THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 78-2179
No. 78-2293

[TITLE OMITTED]

Appellant, General Electric, has filed a motion to amend the Court's Opinion of April 17, 1979. Specifically, appellant requests that the Court excise from the Opinion the following sentence:

> We say this because General Electric represents that the single issue it raises on the merits here will not be raised after final judgment. (Slip at 4).

Citing the relevant colloquy at oral argument, General Electric's counsel asserts that he *did not* represent that the issue "[G.E.] raises on the merits", *i.e.*, the release issue, will not be raised after final judgment. Rather, counsel maintains that in his remarks at oral argument he only "point[ed] out that Curtiss-Wright presumably would be in a position at the end of the litigation *to provide a release* and that final payment could be made at that time . . . " (G.E. Motion at 3) (emphasis added).

The importance of counsel's clarification of his client's "present position" is that he frankly concedes that whether Curtiss-Wright is entitled to *prejudgment interest* on the final payments awarded to it under Judge Coolahan's summary judgment Orders depends in turn upon the resolution of the release issue (G.E. Motion at 3). Thus, counsel for General

Electric has confirmed *exactly* what Curtiss-Wright has maintained in its Petition for Rehearing pending before this Court, namely, that General Electric has not represented that it will pay Curtiss-Wright prejudgment interest on the final payment amounts and can be expected to re-appeal the release issue at the end of the case rather than pay the millions of dollars in pre-judgment interest which will by then have accumulated. *See* Point IC of "Petition for Rehearing for Appellee Curtiss-Wright Corporation" at 11-12.

Nevertheless, even though no representation has been made and General Electric has not modified its position that Curtiss-Wright *must submit a release* prior to final payment, counsel for appellant inexplicably has not moved to have exercised the *conclusion* which the Court drew from the non-existent representation, *viz:* that "it is also entirely possible that there will be no need to decide the merits of this appeal . . . " (Slip at 4). *See* G.E. Motion at 3. Absent the representation, however, the Court's conclusion has no rational basis.

Contrary to what General Electric might suppose, no matter how the remaining claims in suit, including the counterclaim, are resolved,[1] Curtiss-Wright is not about to submit a release or do anything else which would operate to release the award of prejudgment interest which Judge Coolahan has included in his

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1. It should be noted that General Electric never asserted its counterclaim against either Curtiss-Wright's motions for summary judgment or its motions for prejudgment interest, and any recovery on the counterclaim *will not* affect Curtiss-Wright's award of prejudgment interest on its final payment claims. We call this to the Court's attention with all due respect, because, at the time of oral argument, at least one member of the majority apparently thought, erroneously, that a recovery by General Electric on the counterclaim would mean that Curtiss-Wright would not have been entitled to prejudgment interest. (Transcript of Appellate Argument at 16). Only a reversal of Judge Coolahan on the release issue can affect the award of prejudgment interest.

orders for summary judgment and which by the end of the case will most likely be at least double or triple the present total of $1.5 million.[2] Likewise, it will not be a surprise to anyone when, at the end of the case, General Electric files another appeal on the release issue to attempt to save itself these millions of dollars in prejudgment interest.

Clearly, Judge Coolahan did not abuse his discretion in certifying as final his Summary Judgment Orders because of the remote, if not non-existent possibility that the release issue might become moot. The decision to exercise or not excercise Rule 54(b) discretion does not and should not turn on what can only be called wishful thinking on General Electric's part.[3]

Finally, General Electric contends that the Court's judgment denying jurisdiction over these appeals should not be reversed even though the Court was operating under a misapprehension as to the significance of counsel's remarks. Curtiss-Wright disagrees and maintains that the release issue should be decided by this Court *now*.

First, our reading of the Opinion is that the Court's discussion of the mootness issue was not gratuitous but concerned an issue important to the Court's determination. *Allis-Chalmers* itself places a substantial weight in the 54(b) determination process on the possibility of mootness or the absence of such possibility. 521 F.2d 360, 364 (3d Cir. 1975).

2. *I.e.*, as of the dates of the District Court's final judgment Orders.

3. General Electric also reasserts its position that certification in this case has violated the rule against interlocutory appeals (G.E. Motion at 4). These appeals, however, are clearly appeals from final judgments and are not interlocutory appeals. The *Allis-Chalmers* case specifically so holds, 521 F.2d 360, 362-63 (3d Cir. 1975), and we submit that there is no need for further argument on this point.

In addition, in light of General Electric's "present position" which, in effect, is that it will re-appeal the release issue, it becomes imperative for the Court to exercise jurisdiction over these appeals at this time. Otherwise, Curtiss-Wright's award of prejudgment interest presently totaling $1.5 Million will continue to run at the rate of *$3,000 per day!*. Surely this is not a typical case. The Court should not permit this potential recovery to remain uncertain in the minds of the parties throughout the remainder of the litigation. Such *uncertainty* can only have adverse affects upon the subsequent course of litigation and/or the settlement thereof as well as on the business planing of the litigants. On this basis alone, we submit that the release issue is now ripe for appeal.

Curtiss-Wright submits that the Court cannot properly resolve the matter by simply granting General Electric's motion to amend. As set forth in detail in Curtiss-Wright's Petition for Rehearing, the Court, when it first considered these appeals, was under a misapprehension as to the nature of General Electric's counterclaim[4] in addition to its misunderstanding as to the representation of General Electric's counsel. We respectfully suggest that a rehearing on these issues is necessary to serve the interests of justice in this case.

4. See Points 1A and 1B of the "Petition for Rehearing for Appellee Curtiss-Wright Corporation" at 3-11.

Response to Motion

CONCLUSION

For the foregoing reasons appellant's motion to amend the Opinion of the Court, insofar as appellant argues that the proposed amendment does not affect the Judgment of the Court, should be denied.

Respectfully submitted,

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& Purcell
Attorneys for Appellee,
Curtiss-Wright Corporation

By: Ralph N. Del Deo
Richard S. Zackin
Gerard C. Sims

ORDER OF THE THIRD CIRCUIT COURT OF APPEALS AMENDING OPINION, DATED MAY 11, 1979

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 78-2179 and 78-2293

CURTISS-WRIGHT CORPORATION,

v.

GENERAL ELECTRIC COMPANY,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Present: SEITZ, *Chief Judge,* ALDISERT and ROSENN,
Circuit Judges

ORDER AMENDING OPINION

It is ORDERED that the first full paragraph on page 4 of the printed slip opinion in the above captioned matter, filed on April 17, 1979, be and hereby is deleted.

BY THE COURT,

SEITZ
Chief Judge

DATED: May 11, 1979

ORDER OF THIRD CIRCUIT COURT OF APPEALS AMENDING DISSENTING OPINION, DATED MAY 21, 1979

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 78-2179
78-2293

CURTISS-WRIGHT CORPORATION,

v.

GENERAL ELECTRIC COMPANY,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

D.C. Civil No. 76-0794

Before SEITZ, *Chief Judge*, ALDISERT and ROSENN, *Circuit Judges*

ORDER AMENDING DISSENTING OPINION

The dissenting opinion in the above-entitled matter, filed April 17, 1979, is amended as follows:

Order Dated May 21, 1979

1. The text is deleted from line 23 at page 10 of the slip opinion, beginning with the words "*Allis Chalmers* only prescribed," through the end of line 8 on page 12, which concludes with the words "judgment under Rule 54(b)", including footnote 6.

2. The following paragraph is substituted in place of the deleted text:

> There is in the present case, however, a second factor that both establishes the harshness of circumstances here and has an independent significance to be balanced against the counterclaims. The district court stated unequivocally that the issues to be reviewed in a certified appeal would not duplicate any of the issues raised by the remaining claims and noted that certification would not entail unnecessary appellate review.[5]

3. Footnote 5 is retained as it is in the original slip opinion.

MAX ROSENN
Circuit Judge

Dated: May 21, 1979

ORDER OF THE THIRD CIRCUIT COURT OF APPEALS DENYING THE PETITION FOR REHEARING, DATED JUNE 4, 1979

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 78-2179 & 78-2293

CURTISS-WRIGHT CORPORATION,

v.

GENERAL ELECTRIC COMPANY,

Appellant.

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, and ALDISERT, ADAMS, GIBBONS, ROSENN, WEIS and HIGGINBOTHAM, *Circuit Judges.**

The petition for rehearing filed by Appellee in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular

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* Judges Hunter and Garth did not participate in the consideration of this matter.

Order Dated June 4, 1979

active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

For the reasons pointed out by Judges Rosenn and Gibbons, Judges Adams and Higginbotham believe that the issues raised in this appeal are of sufficient importance so as to command the attention of the full Court. Accordingly, they vote for rehearing.

BY THE COURT

ALDISERT
Judge

Dated: June 4, 1979

DISSENTING OPINION SUR DENIAL OF PETITION FOR REHEARING, FILED JUNE 4, 1979

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 78-2179 and 78-2293

CURTISS-WRIGHT CORPORATION,

v.

GENERAL ELECTRIC COMPANY,

Appellant.

(D.C. Civil No. 76-0794)

DISSENTING OPINION SUR DENIAL OF PETITION FOR REHEARING

(Filed—June 4, 1979)

GIBBONS, *Circuit Judge*, dissenting:

I dissent. In a casual *per curiam* opinion[1] the panel majority, without analysis or explanation, has established a virtual *per se* barrier to Rule 54(b) certification in civil damage actions involving counterclaims. With similar un-

[1] Internal Operating Procedure V.B.1. specifies that *per curiam* opinions are to be reserved for "those cases where the law is relatively clear and does not necessitate a signed opinion." With deference, I suggest that Judge Rosenn's opinion persuasively demonstrates that this is not a proper case for a *per curiam* disposition.

illumination the panel majority also adopts the rule that financial hardship should never be a justification for Rule 54(b) certification unless the claimant is insolvent. These extraordinary holdings find no support in the prior law of this circuit and run directly counter to the spirit and purpose of Rule 54(b). If applied literally and consistently, they will sharply limit the effective use of Rule 54(b) in this circuit, with resulting harm both to litigants and to the ability of district judges to expedite the disposition of cases. This threat to the integrity of the Rule 54(b) certification process is worthy of the court's *en banc* attention.[2]

I. THE FACTS

This suit is a paradigmatic example of a complex commercial litigation. It grows out of the performance, over a period of nearly a decade, of 21 subcontracts for the production of nuclear propulsion components. These subcontracts had a total value of $215 million. Curtiss-Wright's initial complaint pleaded 16 counts of fraud, misrepresentation, and breach of contract on the part of General Electric in the performance of various subcontracts. Three counts later added by an amended complaint sought $19 million in contract price balances owed under the 21 subcontracts. The latter claims are the subject of this appeal.

General Electric's counterclaim is in two parts. Counts I-IV of the counterclaim constitute a single attempt to

[2] This dissent necessarily retraces some of the ground covered in Judge Rosenn's thoughtful dissent from the panel opinion, with which I fully agree. I write separately only to stress certain features of this case which make it a particularly worthy subject for *en banc* reconsideration.

recover, on different theories, for $1.9 million in costs incurred as the result of "extraordinary efforts" in the nature of technical assistance provided to Curtiss-Wright during the performance of the 21 contracts in suit. Count V sweeps more broadly. In it, General Electric claims that the same "extraordinary efforts" for which it seeks to recover in Counts I-IV of the counterclaim enabled Curtiss-Wright to avoid a contract default and a consequent loss of $52 million. General Electric asserts a claim to that $52 million on the theory that Curtiss-Wright has been unjustly enriched by what it never gained, but did not lose.

The facts underlying most of the claims in this extraordinarily large and complex commercial dispute are hotly disputed. Reviewing the case, the district court concluded that full resolution of all of the issues in the case would require "many months, if not years." Certainly this court is in no position to contest that conclusion. Curtiss-Wright's $19 million claim on the subcontracts, however, is not subject to factual dispute. General Electric has accepted the Curtiss-Wright components, has found no fault with them, and has used them in the performance of its prime contract with the Navy. Its sole defense to the claims to payment on the subcontracts is Article 5(c), a provision in each agreement which requires that as a condition to final payment Curtiss-Wright must release all claims arising out of the performance of that agreement. General Electric contends that so long as Curtiss-Wright's 16 claims remain pending Article 5(c) constitutes a bar to recovery of the undisputed contract balances. The application and interpretation of Article 5(c) to the 16 claims presents a pure question of law which the district court decided in Curtiss-Wright's favor. With the exception of that legal issue, there is no dispute that Curtiss-Wright is entitled to final payment upon the subcontracts.

II. The District Judge's Decision

With the case in this posture, more than two years after the filing of the original complaint, the district judge granted Curtiss-Wright's motion for summary judgment on the three subcontract claims. The court then made both the "express direction" for entry of judgment and the determination that there was "no just reason" for delay required by Rule 54(b). In doing so, it complied fully with this court's decision in *Allis-Chalmers Corp.* v. *Philadelphia Electric Co.*, 521 F.2d 360 (3d Cir. 1975), by providing a carefully considered written statement of reasons supporting the decision to direct entry of a final judgment. In that statement the court noted that the certification remedy was to be reserved for "the infrequent harsh case." Moreover, he found that the presence of General Electric's counterclaim, and the consequent possibility of a setoff, militated against certification. But on balance, he concluded that sound judicial administration and fairness to litigants would ultimately be advanced by certification. With regard to judicial administration, the court found that the certification of the order as a final judgment could not result in unnecessary or duplicative appellate review: the contract claim was "separate, distinct, and independent of any other claims in this lawsuit," and would not be mooted by further proceedings in the case. The district court also concluded that certification would cause delay or inefficiency at the trial court level, since the other claims in the case could be prepared for trial during the pendency of the appeal.

On the issue of fairness to the litigants, the district court noted that until judgment was entered on the contract counts Curtiss-Wright would be entitled only to 6%

prejudgment interest on its $19 million claim, and would be required to absorb the difference between that rate and the much higher market rate of interest, thereby suffering "daily financial losses from nonpayment of these liquidated debts." This injustice, the court concluded, could prove exceptionally severe since "because of the complex nature of the remaining claims in this case, the delay in payment which would occur if certification were denied would span many months, if not years."

III. The Panel Majority Opinion

The panel majority opinion rejects the district court's carefully considered decision on two grounds. First, it postulates that *Allis-Chalmers Corp.* v. *Philadelphia Electric Co., supra,* establishes blanket presumption against the certification of separate claims where a counterclaim is pending. Second, it holds as a matter of law the district court could not have viewed the loss of over one million dollars in annual interest, even for a period of "many months or years," as a "harsh circumstance" sufficient to overcome that presumption and permit an immediate appeal. It therefore concludes that, despite the district judge's unchallenged finding that this appeal poses no risk of delay or wasted effort at either the trial court or appellate level, the decision to enter final judgment on the $19 million claim must be reversed.

IV. The Panel Majority's Use of Precedent

The panel majority opinion effectively holds that the district court may not enter a Rule 54(b) money judgment in an action in which a non-frivolous counterclaim has been

filed unless the party seeking to recover on the judgment is insolvent. The opinion makes no serious effort to justify this result. Rather, it asserts that its decision is compelled by this court's decision in *Allis-Chalmers.* In support of this conclusion, however, it cites not to the *Allis-Chalmers* majority opinion, but to my *dissent* in that case.

I am underwhelmed. First, as Judge Rosenn points out,[3] Judge Garth's majority opinion in *Allis-Chalmers* stresses that the reversal and remand of the Rule 54(b) certification in that case did *not* rest on a determination "that this was an improper case for Rule 54(b) certification." 521 F.2d at 367 n.16. According to the *Allis-Chalmers* court the remand was "*only* for a *statement of reasons,*" and "express[ed] no opinion on" the merits. *Id.* (emphasis in original). Second, contrary to the panel majority's assertion, my dissent in *Allis-Chalmers* was not directed to the majority's improper evaluation of the merits of the certification, but rather to its unprecedented and unwarranted imposition of a "statement of reasons" requirement in a case where the justification for certification was glaringly apparent on the face of the record. This is evident from even a cursory reading of the passage cited by the panel majority. *See* 521 F.2d at 367. Finally, although *dicta* in *Allis-Chalmers* might be read to cut against certification here, there is, as Judge Rosenn demonstrates,[4] other language in the opinion which would permit and indeed encourage the result reached by

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[3] Dissenting Opinion at 9.

[4] Dissenting Opinion at 8.

the district court.[5] The majority's unsupported conclusion that *Allis-Chalmers* controls here simply cannot be credited.

V. Analysis

The fact that the panel majority opinion is neither controlled nor supported by prior precedent does not of course demonstrate that its holding is erroneous, or that it warrants the court's *en banc* consideration. Thus I turn to the substance of the panel majority's argument.

A. *The Creation of a Presumption against Certification in Suits involving Counterclaims*

The first holding is that the presence of a counterclaim is an action for money damages creates a presumption against a Rule 54(b) certification. This is a gross oversimplification of the Rule 54(b) inquiry, and conflicts with prior decisions of the Supreme Court and of this court sitting *en banc*. True, "[t]he district court's discretion in entering a Rule 54(b) certificate where a counterclaim is involved should be exercised with special care." 6 *Moore's Federal Practice* ¶ 54.35 at 585 (2d ed. 1976). The reason is straightforward: experience shows that in cases where a counterclaim (particularly a compulsory counterclaim) has been filed, there is an increased possibility that there

[5] It is worth noting that the district judge in *Allis-Chalmers* clearly did not regard that decision as barring Rule 54 certification of a money judgment when a counterclaim was pending. On remand, after preparing the "statement of reasons" demanded by the *Allis-Chalmers* majority, he immediately reentered judgment upon the claim. *See Note,* 54 N.C.L. Rev. 1265, 1274 n.58 (1976).

will be some "just reason" to delay the entry of judgment. For example, the presence of a compulsory counterclaim may indicate that there is a risk that in a second appeal from judgment on the counterclaim the court of appeals will be required to consider virtually the same factual and legal questions presented in the Rule 54(b) appeal. *Panichella* v. *Pennsylvania R.R. Co.,* 252 F.2d 452, 455 (3d Cir. 1958). In other counterclaim cases, there may be *a* risk that a Rule 54(b) appeal will simply "delay the trial of the [counterclaim] without in any way simplifying or facilitating its future litigation." *Id.* at 455; *Campbell* v. *Westmoreland Farm, Inc.,* 403 F.2d 939, 942 (2d Cir. 1968).

The mere fact that a non-frivolous counterclaim has been filed, however, does not demonstrate that either of these risks is present. There will frequently be cases, like this one, where there is no risk of duplicative appellate review or unwarranted delay of the proceedings in the trial court. In such cases, the fact that a counterclaim has been filed is an essentially neutral factor in the Rule 54(b) analysis. The presence of that claim of course creates a risk that the plaintiff will ultimately be required to pay back a portion of the Rule 54(b) judgment. But there is an equal risk that the counterclaimant will fail to prove his case at trial and will have to pay out. Common sense suggests that where both parties are solvent the party whose claim is liquidated in amount and reduced to judgment generally has the stronger claim to possession of the disputed fund during the litigation of the remaining claims. *See,* Comment, 56 B.U.L. Rev. 579, 592-93 (1976).[6]

[6] The *dictum* in *Allis-Chalmers* that the presence of a counterclaim in a case "weighs heaviy against the grant of a 54(b) certification," 521 F.2d at 366, thus sweeps too broadly and ought not to be followed.

It is here that the central role of the district judge in the operation of Rule 54(b) emerges. If he determines that the counterclaim is substantial and likely to succeed if pressed to judgment, he may well conclude that certification is unwarranted. On the other hand, the judge may also decide that the counterclaim asserted is so much smaller than the liquidated judgment, or so speculative and difficult of proof, that it would be unfair to delay the entry of judgment while the counterclaimant attempts to prove his case. The judge may even conclude that all or part of the counterclaim is being pressed principally to delay payment on the principal obligation, and enter judgment under Rule 54(b) in order to encourage a prompt settlement of the remaining claims in controversy.

The relationship between Rule 54(b) certifications and settlements is, from the viewpoint of the district courts, particularly significant. In commercial litigation it requires little imagination for lawyers to conjure up facially plausible though factually weak counterclaims Experienced lawyers and judges are all to familiar with the possibilities for delay inherent in liberal federal discovery rules. District judges on the scene are particularly well situated to exercise informed judgment as to when the entry of a final judgment on a complaint will remove the incentive for time consuming and costly litigation over "imaginative" counterclaims. They are, moreover, conscious of the fact that resolution, favorably or unfavorably, of a legal issue dispositive of the plaintiff's claim will frequently produce a climate in which serious settlement negotiations will commence and often succeed. The concern of appellate judges for their own caseloads should not blind them to the reality that by limiting the use of Rule 54(b) they are depriving their brothers in the district court of a significant tool in the management of trial court caseloads.

This case is illustrative. The district judge, on the basis of his personal knowledge of the case, concluded that the presence of General Electric's counterclaim was not a just reason for delay. Curtiss-Wright's liquidated, undisputed claim for nearly $19 million is opposed by an unliquidated, unproven counterclaim for $60 million. But only $1.9 million of that counterclaim is alleged to represent money actually spent by General Electric. The remaining $52-odd million is claimed on the theory that because General Electric spent $1.9 million and thereby helped Curtiss-Wright to avoid a costly default on the subcontracts, it is therefore entitled to recover from Curtiss the $52 million that Curtiss-Wright would have lost in that default on a theory of unjust enrichment. Without expressing definitive views on the merits of the counterclaim, I think it obvious that the district judge concluded, as I do, that it would be unfair to require the plaintiff to finance the prosecution of this claim with its admitted, liquidated judgment. Nor do I regard it as fatal to the certification that the district judge did not list his skepticism about the merits of the counterclaim as a factor in his *Allis-Chalmers* statement. While a judge may not want to appear to prejudge a highly speculative counterclaim, when exercising a judgment as a Rule 54(b) certification he can hardly be blind to its likely worth or to the probability of its settlement when it ceases to serve as an instrument of delay. The district judge may—and often must—rely in his discretionary decisions upon considerations which propriety dictates cannot and should not be placed on the public record. Where, as here, the trial court's *Allis-Chalmers* statement correctly concludes that immediate appeal would not result in any duplicative review or delay of the trial court proceedings, deference to the district court's ap-

praisal of the justice and practicality of entering an immediate judgment is surely appropriate.

The majority opinion strips the district courts in this circuit of the power to make this sort of discretionary Rule 54(b) determination in all cases involving counterclaims. That result, I submit, is squarely contrary to the well-settled principle that the timing of a Rule 54(b) certificate "is, with good reason, vested primarily in the discretion of the District Court as the one most likely to be familiar with the case and with any justifiable reasons for delay." *Sears, Roebuck & Co.* v. *Mackey,* 351 U.S. 427, 437 (1956). *Accord, Bendix Aviation Corp.* v. *Glass,* 195 F.2d 267, 272 (3d Cir. 1952) (*en banc*) (Maris, J.); 10 C. Wright & A. Miller, *Federal Practice & Procedure* § 2659 at 75 (1973); 6 *Moore's Federal Practice* ¶ 54.28[1] at 364; ¶ 54.41[3] at 741 (2d ed. 1976).

The holding is also inconsistent with this court's decisions in *Cold Metal Process Co.* v. *United Engineering & Foundry Co.,* 221 F.2d 115 (3d Cir. 1955), *aff'd,* 351 U.S. 346 (1956), and *Bendix Aviation Corp.* v. *Glass,* 195 F.2d 267 (3d Cir. 1952) (*en banc*). Both cases upheld the jurisdiction of the court of appeals over claims certified under Rule 54(b) despite the pendency in each case of a compulsory counterclaim, and in the absence of any harsh or unusual circumstances beyond those present in this case. In *Cold Metal Process,* the appeal was from a money judgment entered in a complex commercial case. Despite the presence of a compulsory counterclaim, this court concluded that the appeal was "the very kind of thing Rule 54(b) was written to provide for" and held that the district court had not abused its discretion in authorizing it. 221 F.2d 115, 115. The Supreme Court agreed. 351 U.S. at 450-51. *Bendix Aviation Corp.* v. *Glass, supra,* an *en banc*

decision, reviewed a dismissal of plaintiff's claim for specific performance, certified under Rule 54(b), despite the presence of an unadjudicated counterclaim. These cases directly controvert the majority's holding that the pendency of a counterclaim is, without more, a "just reason" for delay under Rule 54(b). That holding is both inconsistent with precedent and unsound on policy grounds.

B. *The "Financial Hardship" Holding*

Because of the panel majority's erroneous view of the effect of the counterclaim upon the Rule 54(b) determination, it skews the Rule 54(b) determination by requiring a showing of "harsh circumstances" in order to justify appeal. Even if I agreed with its position on the effect of the counterclaim, however, I could not accept the panel majority's assertion that for a solvent plaintiff the deprivation for several years of a mere $19 million to which it is concededly entitled can never amount to "harsh circumstances." As Judge Rosenn persuasively demonstrates,[7] this unprecedented result defies common sense, economic reality, and a square holding to the contrary by the Tenth Circuit in *United Bank of Pueblo* v. *Hartford Accident & Indemnity Co.,* 529 F.2d 490 (10th Cir. 1976). At the very least, Judge Rosenn's carefully limited position—that financial hardship to a solvent debtor should be cognizable in a Rule 54(b) determination under the circumstances of this case—is surely correct.

I would go further. Rule 54(b) allows the entry of judgment on a proven or admitted claim when there is "no just reason" for delaying that judgment. By entering that

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[7] Dissenting Opinion at 6-10.

judgment, the district court puts a litigant who would not otherwise be entitled to immediate possession of the disputed fund in a position to execute on the judgment and obtain that fund immediately. In a civil damage action between two solvent parties, it would therefore seem that a needless delay in obtaining possession of a substantial sum of money to which one is entitled under a valid judgment is the *precise* "harsh circumstance" that Rule 54(b) is intended to prevent. The proper rule is that when the district court has determined, as it did here, that "no just reason" exists to delay the entry of judgment, the continued loss of the right to execute on that judgment or obtain a supersedeas bond is *prima facie* an injustice sufficient to support the certification of finality.

Whether one accepts Judge Rosenn's position or mine, however, it is clear that the panel majority's holding is inconsistent with the policy and purposes of Rule 54(b).

VI. Conclusion

Judge Rosenn's dissent demonstrates as well as any opinion can that the panel majority holdings in this case are unsupported by precedent. From what has been said in this opinion, it should also be apparent that these holdings directly undermine the policies which Rule 54(b) seeks to advance. If followed, their effect, I submit, will be to bar the use of Rule 54(b) in "the very kind of case for which Rule 54(b) [was] designed," *Cold Metal Process Co.* v. *United Engineering & Foundry Co.*, 351 U.S. 445, 451 (1951), and to eliminate a significant tool for district court management of the disposition of litigation. Rehearing *en banc* is far more warranted in this case than in many for which we have convened the full court in recent years.

Moreover, given the conflict between this case and the holding of the Tenth Circuit in *United Bank of Pueblo* v. *Hartford Accident & Indemity Co., supra,* and the recognized lack of coherent standards for the review of Rule 54 certifications, *see* 10 C. Wright & A. Miller, Federal Practice *& Procedure* § 2655 at 39 (1973), this case seems a proper occasion[8] for the Supreme Court to break its 23 year silence regarding the proper administration of Rule 54(b) and to provide some much needed guidance to the courts of appeals and to this court especially.

Judge Rosenn joins in this dissent and votes for rehearing *en banc.*

For the reasons pointed out by Judge Rosenn and Judge Gibbons, Judges Adams and Higginbotham believe that the issues raised in this appeal are of sufficient importance so as to command the attention of the full Court. Accordingly, they vote for rehearing.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

---

[8] This is particularly the case where, as here, because of recusals only three of seven eligible judges have voted against rehearing *en banc.*

JUDGMENT OF THE THIRD CIRCUIT COURT OF APPEALS ISSUED IN LIEU OF A FORMAL MANDATE ON JUNE 12, 1979

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 78-2179 and 78-2293

CURTISS-WRIGHT CORPORATION,

v.

GENERAL ELECTRIC COMPANY,

Appellant.

(D.C. Civil No. 76-0794)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present: SEITZ, *Chief Judge* and ALDISERT and ROSENN, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on March 22, 1979.

On consideration whereof, it is now here ordered and adjudged by this Court that the above entitled appeals be, and the same are hereby dismissed for want of an ap-

pealable order and the cause remanded with a direction to the said District Court to vacate so much of its judgment as purported to render a final judgment pursuant to Rule 54(b), all in accordance with the opinion of this Court. Each party to bear its own costs.

Attest:

THOMAS F. QUINN
Clerk

April 17, 1979

Certified as a true copy and issued in lieu of a formal mandate on June 12, 1979.

TEST:

THOMAS F. QUINN
Clerk, United States Court of Appeals for the Third Circuit

GENERAL ELECTRIC'S ANSWERS TO CURTISS-WRIGHT'S INTERROGATORIES 54, 61, 69 & 74

INTERROGATORY 54

As to each instance in which plaintiff has been unjustly enriched as alleged in paragraph 32 of the Counterclaim:

(a) State the date thereof;

Approximately 1970 through 1973.

(b) State in detail all facts which allegedly support the allegation;

Plaintiff has been unjustly enriched in that Defendant, without compensation from Plaintiff, (i) performed work which was the contractual responsibility of Plaintiff; (ii) prevented substantial losses which otherwise would have befallen Plaintiff; and (iii) averted a probable total default in contract performance.

In addition, Plaintiff has been paid for work which it was contractually obligated to perform, but which in fact was partly performed by Defendant. This included specific advice and assistance for the establishment of adequate training and quality control programs.

These facts are shown by the following subsidiary facts or events, among others:

(1) That Plaintiff underestimated the work and encountered severe difficulties in performance is admitted by the Complaint (*e.g.*, ¶¶ 72-74, 81-84, 109).

(2) To prevent a severe default by Plaintiff and grave damage to the timely production of components for the Naval Nuclear Program, Defendant (as well as the Navy) had to render advice and assistance to Plaintiff repeatedly in areas of Plaintiff's management responsibility. These included the establishment and conduct of an adequate training program for welders; the need to explain to Plaintiff its deficiencies in instituting systematic quality control measures; the need to follow up repeatedly because of Plaintiff's unwillingness or inability to carry out suggestions concerning the management of its work; and the need to undertake repeated and extraordinary inspections and to recommend corrective measures due to Plaintiff's unacceptable incidences of defective welding. Under the purhase orders, all of these items were the responsibility of Plaintiff, not Defendant. See also answers to Interrogatories 20 and 25 *supra*.

(3) Plaintiff during the period approximately 1970-73 demonstrated no capacity to resolve without such assistance from Defendant (as well as the Navy) its problems stemming from poor workmanship and inadequate training, inspection, and quality control programs. It is reasonably expectable, therefore, that without the extraordinary assistance rendered by Defendant, the problems would not have been resolved, Plaintiff would have suffered great losses, and would have so seriously breached its obligations to supply conforming articles, within agreed upon delivery schedules, as to be in total default on the purchase orders.

(c) Identify all persons who have knowledge of each fact;

See answers to Interrogatories 20 and 25 *supra*.

(d) Identify each document which discusses, reflects, refers or in any way relates thereto.

See answers to Interrogatories 20 and 25 *supra*.

INTERROGATORY 61

(a) Set forth the total dollar amount of damages claimed by Defendant under Count I of the Counterclaim.

Approximately $1,912,000.

(b) Separately, as to each element of damages, including but not limited to costs or expenses incurred, and/or lost profits, which Defendant seeks to recover under Count I of the Counterclaim:

(i) Set forth the date(s) on which it was incurred;

By Count I, Defendant seeks to recover excess costs and expenses incurred in the following approximate amounts for approximately the years 1970-1973:

1970 — $425,000

1971 — $577,000

1972 — $485,000

1973 — $425,000

(ii) Set forth in detail the substance and purpose thereof;

See responses to Interrogatories 20, 25, 45-47, 54-56 (First Set).

(iii) Identify each person, whether employed by Defendant or the Government, who authorized, recommended or approved any activity or expenditure pertaining thereto.

W. H. Bruggeman

C. R. Stahl

The Managers of the Machinery Apparatus Operation ("M.A.O.") Sections of Reactor Equipment and Heat Exchangers and Pressurizers during the applicable period (approximately 1970-1973) (See response to Interrogatory 2(c) (First Set).)

The Subsection Managers, of Purchasing and Engineering, for the M.A.O. Sections of Reactor Equipment and Heat Exchangers and Pressurizers during the applicable period. (See response to Interrogatory 2(c) (First Set).)

J. W. Vaughan

When seeking payment from the Government pursuant to its prime contracts with the Navy, Defendant submits its Public Vouchers for Purchases and Services other than Personal to the Defense Contract Audit Agency ("DCAA"), which forwards the Vouchers to the Defense Contract Administration Services Region ("DCASR") in Boston, Massachusetts. Payment to Defendant issues from DCASR.

In addition to the foregoing, information which is discoverable and responsive to this Interrogatory may be derived or ascertained from the records of Defendant as made available, or to be made available, to Plaintiff for inspection and copying in response to Plaintiff's First Request for Production of Documents or Plaintiff's Second Set of Interrogatories, which records include but are not limited to the following or portions thereof:

Minutes of Meetings between ANSTR and the General Manager of M.A.O.

Minutes of Meetings between Admiral Rickover and the General Manager of M.A.O.

Files of W. A. Northrop

Documents listed in response to Interrogatory 20(c)(v) (First Set)

See also responses to Interrogatories 25(b)(v), 45(c)(v), and 47(b) (First Set).

(iv) Identify the subcontract(s) under which or in connection with which it was incurred;

Each of the twenty-one subcontractors involved in this action.

(v) Set forth in detail the manner in which the dollar amount thereof was calculated, and identify the date(s) on which said calculations were made and the person(s) who performed and/or approved said calculations.

	($ in 000's)				
	1970	*1971*	*1972*	*1973*	*Total*
Total M.A.O. Labor (Large Components Only)	$875	$874	$872	$870	$3491
Percentage of Normal Labor Allocable to Plaintiff	50.9%	67.2%	55.6%	48.6%	55.5%
Normal Labor Assocable to Plaintiff	$445	$587	$484	$422	$1938

II. Distribution of Normal Labor Allocable to Plaintiff within M.A.O.:

Reactor Equipment Section—35.7%

Heat Exchangers and Pressurizers Section—49.3%

Quality Control and Manufacturing Control and Materials Engineering Sections, and Miscellaneous —15.0%

III. Estimated Percentages in Excess of Normal Labor Expended for Plaintiff During Approximately 1970-1973:

Reactor Equipment Section—100%

Heat Exchangers and Pressurizers Section—25%

Quality Control and Manufacturing Control and Materials Engineering Sections, and Miscellaneous —30%

IV. Calculation of Excess Costs and Expenses Incurred:

Formula—Normal Labor Allocable to Plaintiff X Distribution of Normal Labor Allocable to Plaintiff X Estimated Percentages in Excess of Normal Labor; Plus General and Administrative Expenses and Overhead

	($ in 000's)				
	1970	*1971*	*1972*	*1973*	*Total*
Reactor Equipment Section	$159	$209	$173	$151	$ 692
Heat Exchangers and Pressurizers Section	$ 55	$ 72	$ 60	$ 52	$ 239

	($ in 000's)				
	1970	*1971*	*1972*	*1973*	*Total*
Quality Control and Manufacturing Control and Materials Engineering Sections, and Miscellaneous	$ 20	$ 26	$ 22	$ 19	$ 87
Subtotal	$234	$307	$255	$222	$1018
Add G & A and Overhead	$191	$270	$230	$203	$ 894
TOTAL COST	$425	$577	$485	$425	$1912

Calculations of the nature set forth above were made on or about June 7, 1977, by J. Russell, with W. A. Northrop, R. Savidge, P. Jones, J. Lavish, and R. Henke, and were reviewed by F. J. Balicki and W. A. Northrop. Calculations of the nature set forth above were also made by J. Russell on or about May 2, 1978, and were reviewed by E. A. Klein and W. A. Northrop.

(vii) State whether Defendant seeks recovery on its own behalf or on behalf of the Navy.

For the ultimate benefit of the United States. Such recovery will initially be by, and payment made to Defendant.

(viii) State whether Defendant has invoiced or otherwise requested reimbursement from the Government therefor, and, if applicable, set forth the dollar amount of the invoice or request and the date thereof.

Yes. Information which is discoverable and responsive to this Interrogatory may be derived or ascertained from the records of Defendant as made available, or to be

made available, to Plaintiff for inspection and copying in response to Plaintiff's First Request for Production of Documents or Plaintiff's Second Set of Interrogatories, which record include but are not limited to the following or portions thereof:

> "Public Voucher[s] for Purchases and Services other than Personal" produced by letter dated July 28, 1977.

(ix) State whether Defendant has been reimbursed by the Government therefor, and, if applicable, set forth the dollar amount of the reimbursement and the date thereof;

See response to Interrogatory 61(b)(viii) *supra.*

(x) Identify the prime contract(s) and the applicable provisions thereof under which Defendant was reimbursed by the Government thereof;

Prime contracts:

N0024-67-C-5014

N0024-67-C-5016

N0024-67-C-5321

N0024-69-C-5154

N0024-70-C-5027

N0024-71-C-5461

N0024-72-C-5514

N0024-73-C-5024

N0024-74-C-5009

All the prime contracts listed above are cost-plus-fixed-fee contracts. By their very nature, therefore, they provide for the reimbursement by the Government of allowable costs incurred by Defendant. In addition, this subject is treated in the Article in the General Provisions of each prime contract entitled "Allowable Costs, Fixed Fee, And Payment."

(xi) Set forth the reasons, if any, given by the Government for not reimbursing Defendant in whole or in part therefor. If no reasons were given, so state;

Not applicable.

(xii) Identify each document which discusses, reflects, concerns, or relates thereto, including but not limited to all documents pertaining to the calculation of damages.

Defendant objects to this Interrogatory to the extent that it seeks information which constitutes trade secrets or proprietary information, or information or documents which are protected by the work product privilege or are irrelevant or not reasonably calculated to lead to the discovery of admissible evidence. Without waiving these objections, Defendant makes the following answer.

See responses to Interrogatories 61(b)(ii), 61(b)(iii) and 61(b)(viii) *supra*.

Prime contracts

The twenty-one subcontracts involved in this action.

INTERROGATORY 69

(a) Set forth the total dollar amount of damages claimed by Defendant under Count V of the Counterclaim.

In excess of $53,993,023.

By Count V of its Counterclaim, Defendant seeks to recover (1) the value of the benefit conferred upon Plaintiff as a result of the assistance furnished to Plaintiff by Defendant which went beyond the tacit understanding described in the response to Interrogatory 15(b) (First Set); and (2) amounts constituting the unjust enrichment of Plaintiff resulting from Plaintiff's avoidance of increased costs, substantial losses, and termination-for-default damages as a result of the extraordinary assistance provided by Defendant. With respect to the value of the benefit conferred upon Plaintiff, the total dollar amount is related to the increased costs which Plaintiff would have incurred but for Defendant's extraordinary assistance. Defendant at present has insufficient information to derive or ascertain the total amount of these costs, but such amount exceeds the estimated $1,912,000 that represents the approximate costs incurred by Defendant in rendering the extraordinary assistance. With respect to the remaining damages sought by Count V, (1) Defendant at present has insufficient information to derive or ascertain the increased costs or losses which Plaintiff would have incurred had not Defendant rendered extraordinary assistance; and (2) an estimate of the total damages for which Plaintiff would have been liable had it been terminated for default is $52,081,023.

(b) Separately, as to each element of damages, including but not limited to unjust enrichment, benefit con-

ferred, loss to Plaintiff prevented, and/or lost profits, which Defendant seeks to recover under Count V of the Counterclaim:

(i) Set forth the date(s) on which it was incurred;

With respect to the value of the benefit conferred upon Plaintiff, Defendant at present has insufficient information to respond to this Interrogatory. With respect to the remaining damages sought by Count V, such damages are not divisible in the manner requested in this Interrogatory 69(a) *supra*.

(ii) Set forth in detail the nature thereof;

See response to Interrogatory 69(a) *supra*.

(iii) Identify the subcontract(s) under which or in connection with which it occurred;

Each of the twenty-one subcontracts involved in this action.

(iv) Set forth the exact dollar amount thereof;

See response to Interrogatory 69(a) *supra*.

(v) Set forth in detail the manner in which the dollar amount thereof was calculated, and identify the date(s) on which said calculations were made and the person(s) who performed and/or approved said calculations;

With respect to the value of the benefit conferred upon Plaintiff as a result of the extraordinary assistance provided by Defendant, see responses to Interrogatories 61(b)(v) and 69(a) *supra*. With respect to amounts constituting the unjust enrichment of Plaintiff resulting from Plaintiff's avoidance of increased costs and substantial losses, see response to Interrogatory 69(a) *supra*. The following is an estimate of the termination-for-default damages avoided by Plaintiff as a result of Defendant's extraordinary assistance:

Assume termination for default on December 31, 1972.

Purchase Order	*Progress Payments Recalled (Includes allowance for amounts liquidated and amounts applied to purchase of material in progress)*	*Cost to Pack and Ship Material Purchased*	*Excess Costs of Reprocurement*
A-550	$ 1,011,604	$ 687,890	$ 5,231,983
A-595	$ 497,287	$ 338,155	$ 1,575,929
A-641	$ 412,778	$ 280,689	$ 1,549,180
A-642	$ 231,498	$ 157,419	$ 1,223,047
A-656	$ 937,980	$ 637,827	$ 3,189,417
A-661	$ 753,827	$ 512,602	$ 2,336,437
A-675	$ 684,462	$ 465,434	$ 1,825,180
A113	—	—	$ 290,856
B382	$ 396,529	$ 269,639	$ 864,032
B-412	$ 358,496	$ 243,777	$ 897,376
B-423	$ 56,773	$ 38,606	$ 196,759
B-433	$ 284,835	$ 193,688	$ 823,416
B-384	$ 532,689	$ 362,228	$ 2,916,046
B-425	$ 351,532	$ 239,041	$ 838,082

Purchase Order	*Progress Payments Recalled (Includes allowance for amounts liquidated and amounts applied to purchase of material in progress)*	*Cost to Pack and Ship Material Purchased*	*Excess Costs of Reprocurement*
B-429	$ 1,049,045	$ 813,351	$ 3,033,045
B-452	$ 1,248,498	$ 565,986	$ 2,599,712
B-478	—	—	$ 637,932
B-410	$ 970,148	$ 439,800	$ 3,010,500
B-442	$ 158,849	$ 108,017	$ 627,460
B-451	$ 66,354	$ 45,120	$ 381,755
B-428	$ 452,940	$ 307,999	$ 869,487
TOTAL	$10,456,124	$6,707,268	$34,917,631

Total Estimated Termination-for-Default Damages:

$10,456,124
6,707,268
34,917,631

$52,081,023

Calculations of the nature set forth above were made on or about June 2-6, 1977, and were reviewed by E. A. Klein, J. Holup, F. J. Balicki and W. A. Northrop. Calculations of the nature set forth above were also made on or about April 26, 1978, by A. Keating, J. McKeon, P. Smith, M. Ottati, T. Fallon, J. Maslyn, R. Buck, H. L. D. Boone and D. Fawl; and were reviewed by J. Grout, J. Holup, E. A. Klein and W. A. Northrop.

(vi) Identify each person, whether employed by Defendant or the Government, who authorized, recommended or approved any activity or expenditure pertaining thereto;

See response to Interrogatory 61(b)(iii) *supra.*

(vii) State whether Defendant seeks recovery on its own behalf or on behalf of the Navy;

For the benefit of Defendant.

(viii) State whether Defendant has invoiced or otherwise requested reimbursement from the Government therefor, and, if applicable, set forth the dollar amount of the invoice or request and the date thereof;

Not applicable.

(ix) State whether Defendant has been reimbursed by the Government therefor, and, if applicable, set forth the dollar amount of the reimbursment and the date thereof;

Not applicable.

(x) Identify the prime contract(s) and the applicable provisions thereof under which Defendant was reimbursed by the Government therefor;

Not applicable.

(xi) Set forth the reasons, if any, given by the Government for not reimbursing Defendant in whole or in part therefor.

If no reasons were given, so state;

Not applicable.

(xii) Identify each document which discusses, reflects, concerns, or relates thereto, including but not limited to all documents pertaining to the calculation of damages.

See response to Interrogatory 61(b)(xii) *supra.*

(c) State whether the damages claimed by Defendant under Count V of the Counterclaim are in addition to the damages claimed by Defendant under either Counts I, II, III, or IV or whether Count V sets forth an alternate legal theory for recovering damages which Defendant seeks to recover under either Counts I, II, II [*sic*] or IV.

In addition to the damages sought by Counts I—IV of Defendant's Counterclaim.

INTERROGATORY 74

(a) State whether Defendant seeks to recover or set off any element of damage, including but not limited to costs or expenses, lost profits and/or unjust enrichment as the result of any instance of assistance to Plaintiff as set forth in the response to Interrogatories 71 and 72, *supra.*

Yes.

(b) Separately, as to each such instance:

(i) Set forth in detail the substance and purpose of the assistance provided and the date(s) on which it was provided;

See responses to Interrogatories 71(b)(i), 71(b)(ii), 72 and 73(a)(i)-(ii) *supra.*

(ii) Identify the persons who provided the assistance and the persons to whom it was provided;

See responses to Interrogatories 61(b)(ii), 72(b)(iii), 72(d)(iv), and 73(a)(iii) *supra.*

(iii) Identify each person, whether employed by Defendant or the Government, who authorized, recommended or approved any activity or expenditure pertaining thereto;

See responses to Interrogatories 71(b)(iii), 72 and 73 (a)(iii) *supra.*

(iv) Identify the subcontract(s) under which or in connection with which it was incurred;

Each of the twenty-one subcontracts involved in this action.

(v) Set forth the exact dollar amount thereof;

By Counts I-IV of its Counterclaim, Defendant seeks to recover the cost of only the assistance furnished to Plaintiff by Defendant which went beyond the tacit understanding described in the response to Interrogatory 15(b) (First Set). As to an estimate of the dollar amount sought for this extraordinary assistance, and how it was calculated, see responses to Interrogatories 61(a), 61(b)(v), 63(a), 63(b)(v), 65(a), 65(b)(v), 67(a) and 67(b)(v) *supra.* The cumulative effect of *all* the assistance provided to Plaintiff by Defendant was the prevention of substantial costs and losses which would have otherwise been incurred by Plaintiff and the avoidance by Plaintiff of substantial damages which would have otherwise arisen if Plaintiff had defaulted on the twenty-one

subcontracts. By Count V of its Counterclaim, Defendant seeks the recovery of these benefits conferred upon Plaintiff, or costs, losses, and damages avoided. As to an estimate of the dollar amount sought by Count V, and how it was calculated, see responses to Interrogatories 69(a) and 69(b)(v) *supra.*

(vi) Set forth in detail the manner in which the dollar amount thereof was calculated, and identify the date(s) on which said calculations were made and the person(s) who performed and/or approved said calculations;

See response to Interrogatory 74(b)(v) *supra.*

(vii) State whether Defendant seeks recovery on its own behalf or on behalf of the Navy;

See responses to Interrogatories 61(b)(vii), 61(b)(vii), 65(b)(vii), 67(b)(vii) and 69(b)(vii) *supra.*

(viii) State whether Defendant has invoiced or otherwise requested reimbursement from the Government therefor, and, if applicable, set forth the dollar amount of the invoice or request and the date thereof;

See responses to Interrogatories 61(b)(viii), 63(b)(viii), 65(b)(viii), 67(b)(viii), and 69(b)(viii) *supra.*

(ix) State whether Defendant has been reimbursed by the Government therefor, and, if applicable, set forth the dollar amount of the reimbursement and the date thereof;

See responses to Interrogatories 61(b)(ix), 63(b)(ix), 65(b)(ix), 67(b)(ix), 69(b)(ix) *supra.*

(x) Identify the prime contract(s) and the applicable provisions thereof under which Defendant was reimbursed by the Government therefor;

See responses to Interrogatories 61(b)(x), 63(b)(x), 65(b)(x), 67(b)(x), and 69(b)(x) *supra.*

(xi) Set forth the reasons, if any, given by the Government for not reimbursing Defendant in whole or in part therefor. If no reasons were given, so state;

Not applicable.

(xii) Set forth the date(s) on which Defendant demanded compensation or notified Plaintiff of an intention to set off and identify each person who made such demand or gave such notice and each person upon whom demand or notice was made. If no demand was made or notice given, so state;

See responses to Interrogatories 62(a)(vii), 64(a) (vii), 66(a)(vii), 68(a)(vii), and 70(a)(vii) *supra.*

(xiii) Set forth the date on which Defendant and/or the Government decided that a claim should be made against Plaintiff and identify each person who was involved in so deciding;

See responses to Interrogatories 62(a)(viii), 64(a) (viii), 66(a)(viii), 68(a)(viii), and 70(a)(viii) *supra.*

(xiv) Set forth the date on which Defendant and/or the Government began to maintain a record or account thereof and identify each person who maintained such record or account;

Answers to Interrogatories

See responses to Interrogatories 62(a)(ix), 64(a)(ix), 66(a)(ix), 68(a)(ix),and 70(a)(ix) *supra.*

(xv) Separately, as to each subparagraph (i)-(xiv), *supra,* identify each document which discusses, reflects, concerns, or relates to the response thereto.

See responses to Interrogatories 61(b)(xii), 62(a)(xi), 63(b)(xii), 64(a)(xi), 65(b)(xii), 66(a)(xi), 67(b)(xii), 68(a)(xi), 69(b)(xii), 70(a)(xi), 72(a)(ii), 72(b)(ii), 72(c)(iii), 72(d)(v), and 73(b) *supra.*

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-105

CURTISS-WRIGHT CORPORATION, *Petitioner,*

v.

GENERAL ELECTRIC COMPANY, *Respondent.*

BRIEF IN OPPOSITION

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RULE:

Federal Rules of Civil Procedure

Rule 54(b) 1, 4, 5, 6, 8, 9, 10

MISCELLANEOUS:

Comment of Advisory Committee on the Federal Rules of Civil Procedure (1971) on Rule 54(b) 5-6

10 C.Wright & A.Miller, *Federal Practice and Procedure: Civil* § 2659 (1973) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-105

CURTISS-WRIGHT CORPORATION, *Petitioner*,

v.

GENERAL ELECTRIC COMPANY, *Respondent*.

BRIEF IN OPPOSITION

OPINIONS BELOW

The Opinion of the Court of Appeals (Pet. App. 17a) is reported at 597 F.2d 35. The Opinions of the District Court (Pet. App. 1a and 10a) are not reported.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

Did the Court of Appeals correctly hold that under Rule 54(b), Federal Rules of Civil Procedure, a Judgment making final an Order adjudicating fewer than all claims between the parties was not properly entered where (1) the party in whose favor it ran (a) showed no specific hardship it would suffer if entry of final judgment awaited the end of litigation, (b)

faced substantial counterclaims, and (c) itself was primarily responsible for the consequence of which it complains because of its long delay in asserting claims; and (2) the sums at issue are in the public fisc rather than in the possession of the party against which recovery is sought?

COUNTERSTATEMENT OF THE CASE

This suit was instituted on April 30, 1976, by Petitioner Curtiss-Wright Corporation ("Curtiss-Wright") against Respondent General Electric Company ("GE"). The Complaint, brought originally in 16 Counts, essentially attempts to blame GE for losses allegedly suffered by Curtiss-Wright in manufacturing large components for the propulsion systems of nuclear-powered naval vessels. GE, a prime contractor of the United States Navy ("Navy"), awarded 21 subcontracts to Curtiss-Wright totaling approximately $215,000,000 from 1968 to 1972. Among the principal allegations of the Complaint are that Curtiss-Wright was induced to enter into this business through misrepresentations, specifically that, although Curtiss-Wright had signed 21 fixed-price contracts, GE had "represented" that Curtiss-Wright was capable of performing the work at a profit, and had guaranteed that Curtiss-Wright would make a profit; that there was a mutual mistake as to the difficulty of the work; and that GE had engaged in a conspiracy with the Navy to deprive Curtiss-Wright of awards of further business. Curtiss-Wright demanded, *inter alia,* that it be awarded damages as the result of "fraud," and that its fixed-price contracts be reformed into cost-plus contracts giving it a profit.

GE filed an Answer denying the salient allegations of the Complaint and presenting various defenses. It also filed a Counterclaim, alleging, *inter alia,* that Curtiss-Wright had misrepresented its capability to manufacture these components and had failed to perform the contracts competently, forcing GE to render Curtiss-Wright extraordinary assistance in order to bring Curtiss-Wright's performance up to standard and to avoid delays and losses and a possible default in delivery of these critical items.

As Curtiss-Wright completed delivery of the components under each contract, it submitted vouchers seeking the final payment under each contract. In seeking those amounts, however, Curtiss-Wright had to confront a contractual clause requiring that "Seller [Curtiss-Wright] . . . agree[s] as a condition precedent to final payment, that the Buyer [GE] and the Government . . . are released from all liabilities, obligations and claims arising under or by virtue of this order" (Pet. App. 3a). Curtiss-Wright offered a qualified release, purporting to reserve "only" the claims of more than $60,000,000 made in its Complaint. After receiving the views of the Navy that the release clause should not be waived,[1] GE declined to make final payment without an appropriate release.

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[1] The Navy stated (Ct. App. A. 120-121):

"The claims which Curtiss-Wright proposes be excepted from the claims release were filed years after the contracts were entered, and in many cases years after the occurrence of the events on which the claims are based. Curtiss-Wright was or should have been fully cognizant that this late identification of claims likely would result in withholding of final payment until the claims were resolved. Based on the above, it is clear that the existence of outstanding claims at the time when final payment otherwise would be due is the result of

Thereafter Curtiss-Wright amended its Complaint to seek the final payments. On cross-motions for partial summary judgment the District Court held that Curtiss-Wright was entitled to the final payments notwithstanding the release clause (Pet. App. 1a-9a). At the same time that Curtiss-Wright moved for partial summary judgment concerning the final payments, it also filed a motion, based on several grounds, to dismiss GE's Counterclaim. That motion was denied.

Curtiss-Wright then moved for a certification of the District Court's orders awarding it the final payments as final judgments under Rule 54(b). The District Court recognized that "[b]oth the plaintiff and the defendant appear to be financially sound. Therefore, plaintiff's financial condition is such that it would be able to await the payment of these sums, and defendant's economic status is such that defendant will be able to satisfy the judgment whenever final judgment is entered" (Pet. App. 12a). It nonetheless held that Rule 54(b) certification should issue, solely because (a) a large sum was involved and (b) the statutory interest rate of six percent to which Curtiss-Wright would be entitled under applicable New York law was below present market rates. In moving for entry of a Rule 54(b) certification, Curtiss-Wright had attempted no showing of specific adverse consequences upon itself flowing from a delay in payment, beyond the receipt of interest at the statutory rate rather than current mar-

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Curtiss-Wright's own actions, the consequences of which were or should have been known to Curtiss-Wright.

". . . Curtiss-Wright's present pursuit of claims against [G.E.] under its subcontracts requires, by the terms and conditions of the subcontracts, a withholding of monies until such time as an unqualified claims release is effected."

ket rates. There was no suggestion, for example, that cash flow problems or any other specific corporate problem would ensue. The record also established that GE did not possess the sums in dispute representing the final payments; rather under its contracts with the Navy, GE would be reimbursed only upon payment to Curtiss-Wright.

On GE's appeal, the Third Circuit reversed the entry of a Rule 54(b) certification, and therefore did not reach the merits of the release clause issue also raised by GE (Pet. App. 17a-22a). Following its earlier decision in *Allis-Chalmers Corp.* v. *Philadelphia Electric Co.*, 521 F.2d 360 (1975), the court held that "[i]n the absence of unusual or harsh circumstances"—such as ones "involving considerations of solvency, economic duress, etc."—and in the face of substantial counterclaims, a Rule 54(b) final judgment should not be entered. A timely petition for rehearing and a suggestion for rehearing *en banc* were denied.

REASONS FOR DENYING THE WRIT

The decision below is clearly correct; it is not in conflict with any decisions of this Court or of any other Circuit; and it turns on the particular circumstances of this case. No issues warranting review by this Court are presented.

1. Petitioner Curtiss-Wright implies criticism of the Third Circuit's holding that a Rule 54(b) certification making final an otherwise interlocutory order disposing of fewer than all the claims in the case should be entered only in the "infrequent harsh case" (Pet. 7-8). That phrase, however, is the language of the Advisory Committee on the Federal Rules of Civil Pro-

cedure in explaining the 1946 Amendment to Rule 54(b), and has been recognized universally as the governing standard. *E.g., Campbell* v. *Westmoreland Farm, Inc.,* 403 F.2d 939, 942 (2d Cir. 1968); *Panichella* v. *Pennsylvania R.R. Co.,* 252 F.2d 452, 455 (3d Cir. 1958), *cert. denied,* 361 U.S. 932 (1960); *Allis-Chalmers Corp.* v. *Philadelphia Electric Co.,* 521 F.2d 360 (3d Cir. 1975); *Huckeby* v. *Frozen Food Express,* 555 F.2d 542, 550 (5th Cir. 1977); *Columbia Broadcasting System* v. *Amana Refrigeration,* 271 F.2d 257, 259 (7th Cir. 1959), *cert. denied,* 362 U.S. 928 (1960). The standard conforms to the strong federal policy against piecemeal appeals. *See Arlinghaus* v. *Ritenour,* 543 F.2d 461, 464 (2d Cir. 1976); *cf. Coopers & Lybrand* v. *Livesay,* 437 U.S. 463, 471 (1978).

2. Curtiss-Wright notes that decisions of this Court recognize that district courts have discretion in deciding whether to issue Rule 54(b) certifications.[2] Curtiss-Wright's suggestion that any Court of Appeals disagreement with a particular certification "conflicts" with those decisions, is hopelessly strained. In recognizing such discretion this Court added that "[w]ith equally good reason, any abuse of that discretion remains reviewable by the Court of Appeals." *Sears, Roebuck & Co.* v. *Mackey,* 351 U.S. 427, 437 (1956).[3] The Third Circuit did not disagree with either of these general propositions. There is no need for this Court to review the particular application here of the "in-

[2] *Cold Metal Process Co.* v. *United Engineering & Foundry Co.,* 351 U.S. 445 (1956); *Sears, Roebuck & Co.* v. *Mackey,* 351 U.S. 427 (1956).

[3] Undisputedly a Court of Appeals is to review carefully, not accept blindly, the correctness of a district court's Rule 54(b) certification. *E.g., Arlinghaus* v. *Ritenour, supra.*

frequent harsh case" test; but in any event the Third Circuit's determination that the District Court's application was too lax on this record lacking any evidence of genuine harshness was clearly correct.

Among other considerations, Curtiss-Wright did not even attempt to identify any specific harm flowing from a delay in payment. Such a delay does not, in and of itself, constitute irreparable injury, even in far more onerous circumstances. *E.g., Sampson* v. *Murray,* 415 U.S. 61, 89-92, n.68 (1974). Both parties are substantial corporations, as the District Court found.[4] In this commercial case, Curtiss-Wright faces substantial counterclaims—which the District Court properly refused to dismiss—and it clearly is "undesirable" to require one party, GE, to pay over to Curtiss-Wright substantial sums at this time "only to be reimbursed if [GE] prevails on its as yet unadjudicated counter-

[4] Curtiss-Wright's inability to show any true hardship was graphically demonstrated, during the pertinent events in this suit, by its active engagement in a campaign to purchase control of an even larger firm, Kennecott Copper Corporation. *See generally Kennecott Copper Corp.* v. *Curtiss-Wright Corp.,* 584 F.2d 1195 (2d Cir. 1978). In the District Court in this action, Curtiss-Wright presented not an iota of evidence that the lack of the funds it seeks to recover here affected even slightly its pursuit of that major corporate effort, or of any other corporate activities.

Curtiss-Wright's implication that the mere involvement of a substantial sum suffices to support a Rule 54(b) certification is baseless; "[t]he formulation of an appealability rule that turns on the amount of the plaintiff's claim is plainly a legislative, not a judicial, function." *Coopers & Lybrand, supra,* 437 U.S. at 472. The test instead is one of exceptional harshness in light of the particularized situation of the party seeking certification. Denial of immediate receipt of a "large" sum may have little effect upon a substantial corporation like Curtiss-Wright, whereas denial of a relatively small sum may be extremely harmful to an individual plaintiff.

claim." *Allis-Chalmers, supra,* 521 F.2d at 366, *quoting with approval* 10 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 2659, at 82 (1973).[5] That consideration is of special force here, where the United States would be obligated to reimburse out of public funds any payment by GE.

In addition, Curtiss-Wright's suit was based largely on events which occurred many years before it instituted the action in 1976—such as claims that misrepresentations made in 1968-69 induced it to enter into the contracts at issue. As the Navy noted in stating that the release clause should be enforced, if any "hardship" falls upon Curtiss-Wright through a delay in final payment, it stems from its own choice to defer raising and getting resolved the claims before final payment ordinarily would be due. Rule 54(b) was not adopted to excuse a large corporation from self-inflicted problems.[6]

To put it mildly, on the merits Curtiss-Wright's entitlement to the monies at issue, in the face of a contractual clause explicitly requiring a release as a con-

[5] Curtiss-Wright's demeaning of GE's Counterclaims is baseless. Not only was a motion to dismiss the Counterclaims denied, but they will be proved at trial. This is hardly the place to discuss the merits of this massive commercial case. However, it safely can be said that a corporation which brings a suit on contentions that, for example, it was "guaranteed" a profit under fixed-price contracts, or that it relied upon an alleged representation of the other party that it "would" make a profit in an endeavor expected to extend over many years and necessarily involving a multitude of factors affecting profitability, is a poor judge of merit.

[6] GE has raised the defenses of statute of limitations and laches to Curtiss-Wright's legal and equitable claims. These defenses have not yet been adjudicated.

dition precedent to final payment, is sharply contested.[7] Entertaining this appeal would have embroiled the Third Circuit unnecessarily in interlocutory consideration of legal issues which typically arise repeatedly in commercial cases.

3. The only other consideration on which Petitioner relied to support Rule 54(b) certification is that statutory interest rates are below current market rates. If that sufficed, virtually *every* interlocutory order sustaining a monetary claim would be immediately appealable. The inconsistency of such a sweeping proposition with the purposes of Rule 54(b) and the policy against piecemeal appeals is manifest and further review of it is unwarranted.

Nor does the decision below conflict, in this regard, with *United Bank of Pueblo* v. *Hartford Accident & Indemnity Co.,* 529 F.2d 490 (10th Cir. 1976), as Petitioner asserts (Pet. 9). The Tenth Circuit there identified the loss of interest as one of numerous factors supporting a Rule 54(b) certification under the facts of that case. It did not hold—as would be required to accept Curtiss-Wright's position—that any loss of interest is a self-sufficient ground for certification. The case is readily distinguishable in other respects: all

[7] GE considers the District Court's ruling on the merits to be entirely incorrect. Many New York cases strictly enforce "condition precedent" clauses in similar circumstances. *E.g., Coulter* v. *Board of Education,* 63 N.Y. 365, 368-369 (1875); *R. J. Marshall, Inc.* v. *Turner Construction Co.,* 139 N.Y.S.2d 55, 58 (Sup. Ct. 1955); *Witherell* v. *Lasky,* 286 App.Div. 533, 535, 145 N.Y.S. 2d 624, 626 (1955). *See also Brandt Corp.* v. *City of New York,* 14 N.Y.2d 217, 219-220, 250 N.Y.S.2d 407, 409, 199 N.E.2d 493, 494-495 (1964). The single case relied upon by the District Court as supporting a contrary result simply did not involve a "condition precedent" clause at all.

claims between the two contending parties had been fully and finally adjudicated; the party in whose favor certification was granted did not face remaining counterclaims, and there was no prospect of payment of substantial sums to it followed by a later obligation of repayment, much less of an interlocutory outflow of public monies. Only an unrelated cross-claim, which could not affect the plaintiff's right to recovery, or the amount of its recovery, remained. 529 F.2d at 492-493.

4. Curtiss-Wright is incorrect in characterizing the Third Circuit's decision as one "that any pending counterclaim bars Rule 54(b) certification" (Pet. 11) or as incorporating "a hard and fast rule that economic loss, no matter how severe, can never constitute a justification for certification" (Pet. 9). On its factual presentations, the case does not raise any such broad questions. The Third Circuit merely rejected Curtiss-Wright's equally extreme position that no specific showing of harshness beyond some limitation in the rate of interest is required. The Third Circuit did not misconceive any specific legal requirements, or misapply the pertinent "infrequent harsh case" test to the facts. No question of general importance concerning Rule 54(b) is presented; rather Curtiss-Wright's Petition merely asserts its parochial interests upon this unique record.

CONCLUSION

The petition for a writ of certiorari should be denied.

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B. The district court properly exercised its discretion in entering final judgments pursuant to Rule 54(b) on its orders granting Curtiss-Wright partial summary judgment. 16

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B. The Third Circuit's holding that the mere pendency of a counterclaim with the possibility of a setoff is a barrier to the entry of final judgment under Rule 54(b) absent "unusual or harsh circumstances" is ill-defined and ill-considered and ignores the interrelationship between Rules 54(b) and 62(h). 25

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals is reported at 597 F.2d 35 (Appendix, 218a-232a, 243a-245a). The petition for rehearing with suggestion for rehearing *en banc* was denied at 599 F.2d 1259 (246a-261a). The district court opinion is unreported (196a-199a).

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on April 17, 1979. A timely petition for rehearing was denied on June 4, 1979 (246a-247a). A petition for certiorari was filed on July 20, 1979 and was granted October 1, 1979. This Court's jurisdiction rests on 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Did the existence of a counterclaim deprive the district court of discretion to grant final certification of judgments in favor of petitioner, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, on claims factually and legally unrelated to the counterclaim even though the district court (a) determined that there was no just reason for delay and (b) provided a carefully considered written statement of all relevant factors supporting its entry of final judgment?

2. Did the district court abuse its discretion by considering the economic loss of more than $1 million per year which would result from a failure to certify as a factor in favor of granting certification pursuant to Rule 54(b) of the Federal Rules of Civil Procedure?

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

The relevant Federal Rule of Civil Procedure is Rule 54(b) which states:

> "(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

STATEMENT OF THE CASE

Between May 1, 1968 and December 21, 1972, Curtiss-Wright Corporation ("Curtiss-Wright") entered into a series of 21 military procurement subcontracts with the General Electric Company ("GE"), a prime contractor for the United States Navy. The subcontracts called for Curtiss-Wright to manufacture and deliver 167 large components designed for use in nuclear powered naval vessels. Although Curtiss-Wright has successfully completed the manufacture and delivery of all of the components in conformity with contract specifications, GE has withheld $18,914,408 of the contract price. The amount of this unpaid balance is not in dispute.

In connection with these subcontracts, Curtiss-Wright brought suit against GE pursuant to the district court's diversity jurisdiction alleging fraud, misrepresentation and contractual breaches and seeking damages and reformation of the subcontracts (6a-41a). In addition, Curtiss-Wright sought payment from GE of the outstanding contract balance — $18,914,408 (78a-80a, 208a-209a). GE, for its part, interposed counterclaims based upon alleged extraordinary assistance rendered by GE to Curtiss-Wright (63a-70a).

Curtiss-Wright then moved for summary judgment on those counts of the complaint which sought to recover the unpaid contract balance of $18,914,408. GE asserted only one ground in opposition to the motion, namely "Article 5c," a contractual provision which GE contended required Curtiss-Wright to release GE and the Government from all other claims pertaining to the 21 subcontracts prior to payment of the contract balance.[1] The district court, however, ruled that under New York law, "Article 5c" was not a bar to the entry of summary judgment and granted Curtiss-Wright's motion.[2] The court also awarded Curtiss-Wright prejudgment interest at the rate of 6 percent simple interest per year.[3]

Thereafter, the district court entered these judgments as final and made both (a) the "express direction" for entry of judgment and (b) the determination that there was "no just reason for delay" as required by Rule 54(b) of the Federal Rules of Civil Procedure (200a, 214a).

In an opinion issued concurrently with its order of final judgment, the district court provided a carefully reasoned statement in support of its decision (196a-199a). The court concluded, *inter alia*:

(1) Entry of final judgment could not, in any way, result in unnecessary appellate review;

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1. GE also asserted that Curtiss-Wright had not completed performance on certain minor aspects of some of the subcontracts. These matters, however, were resolved while the motion was pending and are not relevant here.

2. 164a-172a. On appeal neither party challenged the district court's determination that New York law controls the issue raised by the summary judgment motion in this diversity case.

3. The court ruled that New York law likewise controlled the rate of prejudgment interest (180a-187a).

(2) The claims on which final judgment was entered are separate, distinct, and independent of any of the other claims or counterclaims involved in the lawsuit;

(3) Final judgment will not prevent the rest of the case from being prepared for trial;

(4) The need for appellate review of the claims on which final judgment was entered will not be mooted by any future developments in the district court;

(5) The determinations by the district court regarding the claims on which final judgment was entered will not be changed by later developments in the district court;

(6) The appellate courts will not need to decide the same issues more than once if two appeals should arise out of this case;

(7) Justice to the litigants will be advanced by the entry of final judgment because (a) with prejudgment interest fixed by law at 6 percent simple interest, under modern-day interest rates Curtiss-Wright will suffer daily financial losses from the non-payment of the liquidated debts embodied in the final judgments and (b) due to the complex nature of the remaining claims in suit the delay in payment which would result from a failure to enter final judgment "would span many months, if not years" and "great injustice would result from further delay" (198a);

(8) Curtiss-Wright is financially sound and will be able to satisfy a judgment on GE's counterclaim should such a judgment ever be entered;

(9) In the opinion of the district court, all of the above factors in favor of the entry of final judgment outweighed the presence of GE's counterclaim and the possibility of a setoff.

The Court of Appeals for the Third Circuit, with one judge dissenting, reversed the district court with the direction to vacate so much of the lower court's judgment as purported to render a final judgment pursuant to Rule 54(b). 597 F.2d 35 (218a-232a). The court held that the existence of a pending counterclaim barred Rule 54(b) certification absent "unusual or harsh circumstances." The court also held that the economic loss to Curtiss-Wright which would result from a failure to certify, as described by the district court, while "indeed harsh from Curtiss's viewpoint," did not constitute "unusual or harsh circumstances" justifying the entry of Rule 54(b) certification. 597 F.2d at 36 (222a-223a). Curtiss-Wright's petition for rehearing *en banc* was denied, although four judges voted for the rehearing, three against with two judges recusing themselves. 599 F.2d at 1259 (246a-247a).

SUMMARY OF ARGUMENT

Curtiss-Wright maintains that the district court properly exercised its discretion under Rule 54(b) when it entered final judgment in Curtiss-Wright's favor in the amount of $18,914,408 on claims that are factually and legally unrelated to GE's counterclaims or any other claim in suit. This exercise of discretion is also supported by the district court's finding that a failure to enter final judgment would have unjustly deprived Curtiss-Wright of its property.

Rule 54(b) provides a mechanism whereby the district court in a multiple claims action can enter final judgment on less than all claims in suit. The purpose of the rule is to avoid injustice which may be caused by delay in judgment on a distinctly separate claim pending adjudication of the entire case. The rule empowers the district court to enter a final judgment on a single claim upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. There are no other conditions enumerated in the rule.

In the present case the district court meticulously adhered to each and every requirement of the rule. The only point at issue is whether the district court's express determination that there was no just reason for delaying the entry of judgment constituted an abuse of discretion. An analysis of the history and purpose of Rule 54(b) clearly demonstrates that the district court's exercise of discretion was entirely proper and should not have been disturbed on appeal.

With the adoption of the Federal Rules of Civil Procedure allowing a more liberal joinder of claims than in the past, it became clear that in multiple claims cases injustice could result from delays in entering judgment on individual claims factually and legally unrelated to any of the remaining claims in suit. Thus Rule 54(b) was adopted to permit the district court in its discretion to avoid such injustice.

The United States Supreme Court in *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427 (1956), and *Cold Metal Process Co. v. United Engineering & Foundry Co.*, 351 U.S. 445 (1956), made clear that the discretion afforded the district judge by the rule does not depend upon the "type" of unadjudicated claims, including counterclaims, that would remain in suit after entry of final judgment. The Supreme Court held that under the rule, the primary factor having an impact on the district court's discretion is the factual and legal relationship between the adjudicated and unadjudicated claims. Under Rule 54(b), the district court is free to exercise its discretion to enter a final judgment where claims are sufficiently unrelated and can be decided independently of one another.

Since the adoption of Rule 54(b), the courts have reasoned that the entry of final judgment would be improper only when an immediate appeal of a finally adjudicated claim would generate multiple appeals on the same issues, delay the trial of the remaining claims or be premature for some like reason.

The district judge below in a well-reasoned opinion (196a-199a) demonstrated beyond any doubt that the evils of a premature or "piecemeal" appeal are totally absent in this case. His findings in this regard were expressly noted and unchallenged by the court of appeals. 597 F.2d at 36 (231a).

The district court also concluded that the failure to enter final judgment under Rule 54(b) would cause Curtiss-Wright to suffer severe financial losses. The court considered the existence of GE's counterclaim and the possibility of a setoff but expressly determined that this factor was outweighed by the injustice to Curtiss-Wright of having to wait for a protracted period of time before it could obtain final payment (199a).

Yet the Third Circuit concluded that the district court abused its discretion. The appellate court held that the district court is prohibited from making final a money judgment whenever a pending counterclaim poses the possibility of a setoff "in the absence of unusual or harsh circumstances." The court, although recognizing that the loss to Curtiss-Wright occasioned by the delay in entry of final judgment was "indeed harsh," inexplicably ruled that this harshness was not "unusual or harsh circumstances." 597 F.2d at 36 (222a).

Both the holding and the reasoning of the Third Circuit are contrary to the plain language and purpose of Rule 54(b) and the holdings in *Sears, Roebuck & Co. v. Mackey, supra,* and *Cold Metal Process Co. v. United Engineering & Foundry Co., supra.* Moreover, there is simply no precedent to support the Third Circuit's position.

The Third Circuit's decision throws the operation of the Federal Rules of Civil Procedure into complete disorder:

First, the Circuit has created a virtual *per se* barrier to the entry of a final money judgment whenever a counterclaim poses

the mere possibility of a setoff. This result for all practical purposes divests the district court of its discretion under the rule in such circumstances.

Second, the result reached by the appellate court is more than disturbing in that it will obviously encourage the filing of contrived counterclaims solely for the purpose of delaying payment of debts due and owing.

Third, the Third Circuit's standard of "unusual and harsh circumstances" is ambiguous and provides absolutely no guidance to the district courts in making determinations under Rule 54(b).

Finally, by holding that considerations of setoff, insolvency and economic duress are relevant to determinations under Rule 54(b), the appellate court has, in reality, rewritten the rule making it one which governs not only the entry of final judgments but the enforcement of those judgments as well. Rule 62(h) has been specifically adopted to deal with the enforcement of judgments entered under Rule 54(b) and provides the district court with the mechanisms to deal with questions of setoff, insolvency and the like. Without explanation the Third Circuit ignores Rule 62(h) in stark contrast to the rest of the federal judicial system, which uniformly deals with factors such as setoff and insolvency solely within the context of Rule 62(h) — not Rule 54(b).

It is clear that the district court's entry of final judgment in this case conformed both to the letter and spirit of Rule 54(b) and cannot under any rational interpretation of that rule be held to have constituted an abuse of discretion. The injustice inherent in any delay of a party's ability to enjoy the benefits of a judgment in its favor is alone sufficient to warrant the application of Rule 54(b). If something more is required, the severe financial injustice to Curtiss-Wright caused by the

disparity between the prejudgment interest rate of only 6 percent simple interest per year and the substantially higher modern-day interest rates makes this case one which mandates the application of the rule.

The Third Circuit, however, in its preoccupation with considerations bearing only upon enforcement of judgments has thwarted the intent of the framers of the rule and has reached a result which will lead only to unjust results in future cases as it has in this case.

ARGUMENT

I.

THE DISTRICT COURT PROPERLY ENTERED FINAL JUDGMENTS PURSUANT TO RULE 54(b) ON ITS ORDERS GRANTING CURTISS-WRIGHT PARTIAL SUMMARY JUDGMENT.

A. Rule 54(b) permits the district court to enter final judgment on less than all of the claims in suit when the adjudicated claims are independent of the unadjudicated claims.

Rule 54(b) expressly empowers the district court to enter final judgment on one or more but less than all claims in suit upon the court's express determination that there is "no just reason for delay."

> "When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." Fed. R. Civ. P. 54(b).

In *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 431-32 (1956) (hereinafter "*Sears*"), this Court noted that prior to the adoption of Rule 54(b), a judgment or order disposing of some but less than all the claims between the parties was not "final" and generally not appealable. *See, e.g., Arnold v. United States*, 263 U.S. 427, 434 (1923); *Bowker v. United States*, 186 U.S. 135, 139-41 (1902). The obvious purpose of Rule 54(b) is to avoid injustice which may be caused by the delay in judgment on a distinctly separate claim pending adjudication of the entire case.[4]

As the Court in *Sears* made clear:

> "With the Federal Rules of Civil Procedure, there came an increased opportunity for the liberal joinder of claims in multiple claims actions. This, in turn, demonstrated a need for relaxing the restrictions upon what should be treated as a judicial unit for purposes of appellate jurisdiction. Sound judicial administration did not require relaxation of the standard of finality in the disposition of the individual adjudicated claims for the purpose of their appealability. It did, however, demonstrate that, at least in multiple claims actions, some final decisions, on less than all of the claims, should be appealable without waiting for a final decision on all of the

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4. *See* Advisory Committee Note to 1946 Amendment, 28 U.S.C.A. Fed. R. Civ. P. 54(b) (". . . Rule 54(b) was originally adopted . . . in order to avoid the possible injustice of a delay in judgment of a distinctly separate claim to await adjudication of the entire case."). In *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511-12 (1950), the Court noted the purpose of the rule although it decided the case on other grounds.

claims. Largely to meet this need, in 1939, Rule 54(b) was promulgated. . . ."[5] 351 U.S. at 432-33.

Entry of a final judgment under the rule has at least two important consequences:[6] (1) it permits the losing party to take an immediate appeal of the judgment, and (2) it permits the prevailing party to execute on that judgment.[7] 6 *Moore's Federal Practice* ¶¶ 54.28[1], 54.42 (2d ed. 1976). Therefore, Rule 54(b) serves the salutary purpose of empowering the district court "to determine from the standpoint of justice to the litigants the best time at which to terminate by final judgment the litigation with respect to a single claim in a multiple claims suit and thus to open the way to immediate appellate review and execution of the judgment." *Bendix Aviation Corp. v. Glass,* 195 F.2d 267, 272 (3d Cir. 1952) (*en banc*).[8]

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5. The Court was careful to note that it was not the intent of Rule 54(b) to make appealable purely interlocutory orders involved in a single claim, but that a *final adjudication* of a single claim could now be appealed. In the present case there is no question that the orders of the district court appealed from are *final* dispositions of separate claims. Thus this case does not present an interlocutory appeal prohibited by 28 U.S.C. §1291.

6. Other consequences of Rule 54(b) certification are that the judgment is res judicata as between the parties and that post judgment interest will run from the date of entry of a certified final order. Certification also permits creation of a lien on the judgment debtor's property, satisfies the final judgment requirement for issuance of a writ of execution upon which a lien may then be created, and determines priority of judgment liens. 6 *Moore's Federal Practice,* ¶54.42 (2d ed. 1976).

7. Fed. R. Civ. P. 62(h) permits the district court to stay enforcement of a judgment entered under Rule 54(b) and impose conditions to secure the benefit to the holder thereof. *See* II B, *infra,* at 25-29.

8. Little authority need be cited for the fact that the anticipated increase in multiple claims litigation has been realized perhaps even beyond the expectation of the drafters of Rule 54(b). *See generally* Fraser, *Jurisdiction of the Federal Courts of Actions Involving Multiple Claims,* 76 F.R.D. 525 (1976); Note, *The Challenge of the Mass Trial,* 68 Harv. L. Rev. 1046 (1955); thus, Rule 54(b) serves more than ever as a valuable tool to assist the district courts in their primary responsibility of dispensing justice to litigants.

The dramatic change which Rule 54(b) made in the former general practice with regard to appealability of judgments is illustrated in both *Sears* and its companion case, *Cold Metal Process Co. v. United Engineering & Foundry Co.,* 351 U.S. 445 (1956) (hereinafter "*Cold Metal*"). Both cases make clear that in multiple claims litigation a district court may find that there is "no just reason for delay," within the meaning of Rule 54(b), to enter final judgment on an adjudicated claim when the court has determined that that claim is sufficiently separable from the remaining claims in suit and can be independently decided.

In *Sears,* plaintiffs brought a four count complaint. Count I charged that defendant violated the Sherman Antitrust Act; count II realleged certain allegations of count I on a diversity of citizenship jurisdictional basis; counts III and IV alleged common law unfair competition and patent infringement claims. The district court dismissed counts I and II and entered a final judgment under Rule 54(b) on its order of dismissal. 351 U.S. at 430-31.

Plaintiffs appealed seeking to reverse the district court and to have counts I and II restored; defendant moved to dismiss the appeal on the grounds that the district court's order was not a final judgment. The Supreme Court refused to dismiss the appeal and sustained the district court's entry of final judgment:

> ". . . The grounds for such a motion [to dismiss the appeal] might be (1) that the judgment of the District Court was not a decision upon a 'claim for relief,' (2) that the decision was not a 'final decision' in the sense of an ultimate disposition of an individual claim entered in the course of a multiple claims action, or (3) that the District Court abused its discretion in certifying the order.
>
> In the case before us, there is no doubt that each of the claims dismissed is a 'claim for relief'

> within the meaning of Rule 54(b), or that their dismissal constitutes a 'final decision' on individual claims. Also, it cannot well be argued that the claims stated in Counts I and II are so inherently inseparable from, or closely related to, those stated in Counts III and IV that the District Court has abused its discretion in certifying that there exists no just reason for delay. They certainly *can* be decided independently of each other." *Id.* at 436.

The Court further noted that even though the claim in count I rested in part on some of the facts involved in counts III and IV, the "*basis of liability* in Count I is *independent* of that on which the claims in Counts III and IV depend." *Id.* at 437 n. 9 (emphasis added). It is obvious from the Court's decision that when the district court renders a final adjudication on a claim, and when the proper disposition of that claim will be unaffected by any of the remaining claims in suit, there is no just reason for delay under Rule 54(b).[9]

9. Since the adoption of Rule 54(b), courts which in essence have found "a just reason for delay" under Rule 54(b) have looked to the underlying facts and legal issues involved in the adjudicated and unadjudicated claims, rather than to merely the "type" of claim, and have determined that an immediate appeal of the adjudicated claim would be premature either because: (1) of the possibility of mootness, (2) of the possibility of duplicative appellate review of the same issues, (3) such an appeal would serve only to delay the final disposition of the remaining claims in suit or (4) any combination of these reasons. *See, e.g., Purdy Mobile Homes, Inc. v. Champion Home Builders Co.*, 594 F.2d 1313 (9th Cir. 1979); *Brunswick Corp. v. Sheridan*, 582 F.2d 175 (2d Cir. 1978); *Campbell v. Westmoreland Farm, Inc.*, 403 F.2d 939 (2d Cir. 1968); *Columbia Broadcasting System, Inc. v. Amana Refrigeration, Inc.*, 271 F.2d 257 (7th Cir. 1959), *cert. denied*, 362 U.S. 928 (1960); *Panichella v. Pennsylvania Railroad Company*, 252 F.2d 452 (3d Cir. 1958); *Northway, Inc. v. TSC Industries, Inc.*, 361 F. Supp. 108 (N.D. Ill. 1973), *aff'd in part, rev'd in part on other grounds*, 512 F.2d 324, *rev'd on other grounds*, 426 U.S. 438 (1976); *Liquilux Gas Services of Ponce, Inc. v. Tropical Gas Co., Inc.*, 48 F.R.D. 330 (D.P.R. 1969). In the instant case, none of these "just reasons for delay" are present, and this case is not one where the rule against "piecemeal" appeals has been violated. *See* I B, *infra*, at 16-18.

Prior to Rule 54(b), courts had generally held that the mere pendency of an unadjudicated counterclaim was a barrier to the entry of a final judgment on an order disposing of less than the entire litigation.[10] In *Cold Metal*, the Court noted the prior practice, 351 U.S. at 451, but held that Rule 54(b) makes no distinction between counterclaims and any other type of claim and that counterclaims "are thus equated with the others" in the Rule 54(b) determination process. *Id.* at 452.[11] Accordingly, the Court ruled that its reasoning in *Sears* was also applicable in cases where counterclaims were present and concluded that under Rule 54(b) a district court is free to consider that the adjudicated claim and the unadjudicated counterclaim are sufficiently unrelated so as not to be a just reason for delay.[12] *Id. See* 6 *Moore's Federal Practice, supra,* ¶54.35[1].

To summarize, in multiple claims actions, the district court in its discretion may enter final judgment under Rule 54(b) on a

10. *See, e.g., Bowker v. United States*, 186 U.S. 135 (1902); *Ayres v. Carver*, 58 U.S. (17 How.) 591, 595 (1855); *Toomey v. Toomey*, 149 F.2d 19 (D.C. Cir. 1945); *Radio Corp. v. J.H. Bunnell & Co.*, 298 F. 62 (2d Cir. 1924), *cert. denied*, 269 U.S. 565 (1925); 6 *Moore's Federal Practice, supra,* ¶¶54.20, 54.23[2].

11. The Court in *Cold Metal* held that the rule as amended also makes no distinction between compulsory and permissive counterclaims. 351 U.S. at 452. The original Rule 54(b) did not permit entry of final judgment when the unadjudicated counterclaim arose out of the same "transaction or occurrence" as the adjudicated claim. *See Reeves v. Beardall*, 316 U.S. 283 (1942). In the 1946 amendment, the "transaction or occurrence" language was deleted thus making clear that even a compulsory counterclaim was to be considered no differently than any other unadjudicated claim in the district court's exercise of discretion under the rule.

12. The dissenting opinion in *Cold Metal* argued that Rule 54(b) did no more than codify pre-existing law, and accordingly, that the presence of the counterclaim, substantially based on the same transactions as the adjudicated claim, presented an absolute barrier to certification. 351 U.S. at 439, 443 (Jackson, J., dissenting). The dissent thus highlights the break which Rule 54(b) made with former practice.

single claim and thus avoid an injustice caused by a delay in judgment when the facts and legal issues involved in that claim are sufficiently unrelated to the remaining claims in suit including any counterclaims. Under such circumstances the appeal of the adjudicated claim will not be premature.

B. The district court properly exercised its discretion in entering final judgments pursuant to Rule 54(b) on its orders granting Curtiss-Wright partial summary judgment.

As noted in the Statement of the Case, Curtiss-Wright pursuant to 21 subcontracts manufactured and delivered to GE 167 large components ultimately intended for use in the propulsion systems of nuclear powered surface ships and submarines. GE has never contended in this litigation that the components manufactured by Curtiss-Wright failed to meet specifications or were in any other way defective. Nevertheless, GE has withheld payment of a substantial portion of the contract price — $18,914,408.[13]

The only legal issue involved in the motion for summary judgment on the claims for final payment was whether a certain contractual provision, "Article 5(c)," applicable to each of the 21 subcontracts, permits GE to withhold final payment until such time as Curtiss-Wright shall have released GE and the Government from any other claims under the subcontracts. Since the relevant facts were not in dispute, the district court proceeded to determine this sole legal issue in favor of Curtiss-Wright (164a-172a), and granted Curtiss-Wright's motions for summary judgment on those counts of the complaint which embodied the claims for final payment (175a-177a). The issue of "Article 5c" is not present in any of the other claims in suit.

The court's decision to enter final judgment pursuant to Rule 54(b) on its summary judgment orders was a proper

13. Some of these payments have been due and owing since November 30, 1975 (186a).

exercise of the court's discretion and recognized the injustice its action was preventing. In a well considered opinion (196a-199a), the court clearly demonstrated that there was no just reason for delay by finding as follows:

First, the district court determined that Curtiss-Wright's claims for final payment "are separate, distinct, and independent of any of the other claims or counterclaims involved in this lawsuit." (197a). This determination was eminently correct and unchallenged by the court of appeals. 597 F.2d at 36 (221a).[14]

Second, the district court determined that because of the independence of the claims for final payment from the remaining claims in suit, entry of final judgment would not prevent the rest of the case from being prepared for trial. Neither the court of appeals nor GE have disputed this determination.

Third, the district court correctly concluded that the need

14. The claims for final payment rested on two very simple and undisputed facts: the delivery of the goods by Curtiss-Wright and GE's failure to pay the stipulated balance of the contract price. Curtiss-Wright's other claims are not involved in the summary judgment orders and concern allegations of substantial cost overruns and lost profits resulting from fraudulent inducement, misrepresentations, and various "extra work" claims (6a-41a). GE's counterclaims are similarly unrelated to Curtiss-Wright's claims for final payment, in that they seek to recover (1) claimed costs of alleged technical assistance and (2) alleged unjust enrichment based on the theory that GE prevented Curtiss-Wright from incurring a major default (63a-70a). The facts and legal issues relevant to Curtiss-Wright's remaining claims and GE's counterclaims have absolutely nothing to do with the few simple facts and sole legal issue relevant to Curtiss-Wright's claims for final payment. In this regard it should be noted, as reflected in the district court's opinion (164a-172a), that in opposing Curtiss-Wright's motion for summary judgment GE raised only "Article 5c" and never argued that its counterclaims or affirmative defenses raised facts or legal issues relevant to the court's determination of the motion.

for appellate review would not be mooted by any future developments in the district court.[15]

Fourth, the district court concluded that its determinations on the certified claims would not be changed by later developments in the district court. Neither the court of appeals nor GE have disputed this conclusion, and with good reason. As noted above, the adjudicated claims are factually and legally unrelated to the remaining claims and there is thus no danger that appellate review of the adjudicated claims will be premature.

Fifth, the district court concluded that the appellate courts would not be required to decide a second time the sole legal issue relating to the adjudicated claims, again demonstrating that appellate review would not be premature.

Finally, the district court noted that because of the complex nature of the unadjudicated claims "the delay in payment which would occur if certification is denied would span many months, if not years" (198a).[16] The court, though taking the counterclaim and the possibility of a setoff into consideration, concluded that there was no just reason why Curtiss-Wright should not have the benefit of its judgment, especially in light of the loss in interest

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15. In its first opinion the Third Circuit disagreed with this conclusion because it believed that counsel for GE had represented at oral argument that GE would not appeal on the issue of "Article 5(c)" once the remaining claims in suit had been resolved (222a). Counsel for GE, however, moved to strike this portion of the appellate court's opinion on the grounds that the court had misinterpreted his remarks and that he had not represented that GE would not appeal the district court's summary judgment orders (233a-235a). The court of appeals then amended its opinion accordingly, deleting all reference to the possibility of mootness (243a).

16. Indeed, more than a year already has elapsed since the district court filed its opinion in support of its entry of final judgments under Rule 54(b) (196a-199a).

alone based on the difference between the prejudgment rate of only 6 percent simple interest per annum as fixed by New York law [*see* N.Y. Civ. Prac. Law §5004 (McKinney)] and the interest rates prevalent in today's marketplace.[17] *See also, United Bank of Pueblo v. Hartford Accident & Indemnity Co.*, 529 F.2d 490 (10th Cir. 1976). The Third Circuit acknowledged the harsh result arising from Curtiss-Wright's inability to obtain the money owed to it. 597 F.2d at 36 (222a).

Based on the foregoing it cannot be seriously maintained that the district court abused its discretion. Rule 54(b) firmly establishes the district court's primary authority to determine when its final adjudication of a claim is ripe for appeal.[18] The timing of that decision "is, with good reason, vested by the rule primarily in the discretion of the District Court as the one most likely to be familiar with the case and with any justifiable reasons for delay." *Sears*, 351 U.S. at 437.

The district court has considered the factors relevant to a Rule 54(b) judgment and stated its reasons clearly. This case is precisely the type of case for which Rule 54(b) was intended. There is absolutely no just reason for the district court to have

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17. The Court can take judicial notice of the fact that as of the date of this brief, the "prime rate" of interest is 15.5 percent, and Curtiss-Wright's losses on interest alone from the appellate court's vacation of final judgment currently amount to approximately $5,000 *per day* or $1,800,000 *per year*.

18. The mere fact that a second appeal on unrelated issues may at some future time materialize is not a just reason for delay. Rule 54(b) "undoubtedly affects the amount of grist available from time to time for the appellate mill. But so do a number of the other Civil Procedure Rules which have been upheld as appropriate district court procedure." *Bendix Aviation Corp. v. Glass, supra*, 195 F.2d at 271. Clearly when the district court determines that its final adjudication of a claim is ripe for appeal and acts within its discretion in entering a final judgment, the court of appeals is bound by the rule and should not substitute its judgment for that of the district judge. *See* dissenting opinion of Judge Rosenn in the case *sub judice*, 597 F.2d at 39 (229a).

delayed the entry of final judgment on Curtiss-Wright's claim for final payment. Indeed, all factors relevant to the question of final judgment lead inevitably to the conclusion that the district court's determination effectuated justice without causing a premature appeal. That there was no abuse of discretion is clear beyond any doubt whatsoever.

II.

THE COURT OF APPEALS HAS ERRED BY ESTABLISHING A VIRTUAL *PER SE* BARRIER TO THE DISTRICT COURT'S UTILIZATION OF RULE 54(b) IN CIVIL DAMAGE ACTIONS INVOLVING COUNTERCLAIMS.

A. The Third Circuit's holding that the mere pendency of a counterclaim is a barrier to the entry of final judgment under Rule 54(b) absent "unusual or harsh circumstances" is contrary to the plain language of the rule and to precedent, and interferes with the district court's ability to administer justice to litigants.

The plain language of Rule 54(b) contains no basis for the conclusion that the mere presence of an unadjudicated counterclaim constitutes a just reason for delaying the entry of final judgment on a claim included in the complaint.

As discussed in I, *supra*, the Supreme Court in *Cold Metal*, a case containing an unadjudicated monetary counterclaim, affirmed the entry of judgment on an adjudicated claim and stated that Rule 54(b) "treats counterclaims, whether compulsory or permissive, like other multiple claims." 351 U.S. at 452.

Notwithstanding the language of the rule and Supreme Court precedent, the Third Circuit in this case concluded that the district court improperly entered final judgments under Rule 54(b) on its orders awarding Curtiss-Wright the balance of the

purchase price on the 21 subcontracts in suit. The appellate court held that the entry of final judgment was improper because of the presence of the unadjudicated counterclaim. In so holding, the majority of the court claimed that it was bound by its earlier decision in *Allis-Chalmers Corp. v. Philadelphia Electric Co.*, 521 F.2d 360, 364 (3d Cir. 1975) (hereinafter "*Allis-Chalmers*"). There, the court stated in dictum that the presence of a counterclaim "weighs heavily" against the entry of final judgment "in the absence of unusual or harsh circumstances." *Id.* at 366.[19]

The sole rationale for the appellate court's decision below was that the presence of a counterclaim raised the possibility that some or all of Curtiss-Wright's judgment may one day have to be returned *if* defendant should prevail on its counterclaim.[20]

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19. Although the court of appeals below held that it was "bound" by *Allis-Chalmers*, it does not appear that the dictum in *Allis-Chalmers* necessarily leads to the result reached by the Third Circuit in the present case. The actual holding of *Allis-Chalmers* was that the district court must articulate its reasons for concluding that there is "no just reason for delay," and the case was remanded to the lower court for that purpose. The *Allis-Chalmers* court expressly declined to rule on whether the counterclaim in that case constituted a bar to Rule 54(b) certification. 521 F.2d at 367 n.16. Moreover, the *Allis-Chalmers* court, while expressing the opinion that the pending counterclaim "weighs heavily" against certification, appeared to articulate some sort of balancing test involving an analysis of the relationship between the adjudicated and unadjudicated claims. *Id.* at 365. The district court in this case undertook precisely this type of analysis and concluded that final judgment should be entered. *See* the dissenting opinion of Judge Rosenn in the case *sub judice*, 597 F.2d at 36 (223a-232a). The Third Circuit below, however, now apparently holds that the analysis discussed in *Allis-Chalmers* is irrelevant when a counterclaim is pending.

20. In holding that a possible setoff was a factor under Rule 54(b) the court completely ignored Rule 62(h) of the Federal Rules of Civil Procedure. *See* II B, *infra*, at 25-29. In addition, the appellate court apparently failed to consider the possibility that Curtiss-Wright might be awarded an amount on its remaining claims greater than any amount awarded to GE on the counterclaim.

The court of appeals acknowledged that from Curtiss-Wright's viewpoint the deprivation of the benefit of its judgment was "indeed harsh," but held that this deprivation did not constitute "unusual or harsh circumstances." 597 F.2d at 36 (222a).

The practical effect of the Third Circuit's reasoning is that the possibility of a setoff posed by the pending counterclaim creates a presumption against Rule 54(b) certification and, without more, constitutes a "just reason for delay." *See* the dissenting opinion of Judge Gibbons sur the denial of the petition for rehearing. 599 F.2d at 1262 (254a). This result has no basis in the plain language of the rule and is not supported by the prior decisions of this Court in *Sears* and *Cold Metal.*[21] In

21. Moreover, there is virtually no support in precedent for the Third Circuit's interpretation of Rule 54(b). The court below relied exclusively upon *Allis-Chalmers* which itself relied on only two prior cases, *TPO Incorporated v. Federal Deposit Insurance Corp.*, 487 F.2d 131 (3d Cir. 1973), and *Schroeter v. Ralph Wilson Plastics, Inc.*, 49 F.R.D. 323 (S.D.N.Y. 1969). Neither case, however, supports the proposition that a pending counterclaim "weighs heavily" against Rule 54(b) certification.

In *TPO* the court held that due to the nature of that counterclaim it would be premature to grant *summary judgment under Rule 56* of the Federal Rules of Civil Procedure. In the present case GE did not assert its counterclaim in opposition to Curtiss-Wright's motion for summary judgment. (*See* note 14, *supra.*) Moreover, an analysis of the claim and counterclaim in *TPO* demonstrates that they were completely interrelated factually and legally. *TPO* thus cannot stand for the proposition that the mere pendency of a counterclaim, especially one as in this case which is factually and legally unrelated to the adjudicated claims, stands as a barrier to entry of final judgment under Rule 54(b).

Schroeter v. Ralph Wilson Plastics, Inc., supra, was a case as in *TPO* where the only issue was whether the counterclaim barred the entry of summary judgment. The court indicated by way of dictum in a brief comment that the counterclaim was a factor relevant to a Rule 54(b) determination because of the possibility of a setoff. But it can hardly be argued that this passing remark supports the proposition that a pending counterclaim "weighs heavily" against the entry of final judgment. The great weight of authority is to the contrary. *See* the cases cited in note 29 *infra.*

addition, the appellate court's reasoning is contrary to the interests of sound judicial administration and justice to litigants.

As noted above, Rule 54(b) requires an analysis of the relationship, if any, between the factual and legal issues underlying the adjudicated and unadjudicated claims.[22] The district court below made this analysis and correctly concluded that there was no relationship sufficient to constitute a just reason for delay.

The Third Circuit by its reasoning makes the district court's analysis irrelevant, and virtually divests the district court of all discretion under Rule 54(b). This result directly contravenes the principle firmly established in *Sears* that the determination to release a finally adjudicated claim for appeal is vested by the rule primarily in the discretion of the district court for the obvious reason that that court is the one most likely to be familiar with the case and with any justifiable reasons for delay. 351 U.S. at 437. *Accord, Bendix Aviation Corp. v. Glass, supra,* 195 F. 2d at 272. In this case, the court's reasoning has led to the unfair and harsh result of permitting GE to have the benefit of all the goods which Curtiss-Wright has manufactured and at the same time retain a substantial portion of the contract price, while Curtiss-Wright's remaining claims and GE's counterclaims grind through a lengthy judicial process.

The abrogation of the district court's discretion to enter Rule 54(b) judgments in counterclaim cases will surely have an adverse impact on judicial administration and economy. In holding that a pending counterclaim effectively bars Rule 54(b) certification, the Third Circuit has issued an open invitation to the filing of facially adequate but substantively

22. *See* note 9, *supra,* and the accompanying text at 13-14. The majority opinion below specifically referred to GE's counterclaim as "compulsory." 597 F.2d at 36 (222a). Unless this reference was gratuitous, it reflects a basic misunderstanding of *Sears* and *Cold Metal.*

weak counterclaims.[23] Except in the rare case where summary judgment on the counterclaim is a practical alternative,[24] delay and the encouragement of time-consuming and costly litigation are the inevitable results of the Third Circuit's holding in this case. The court of appeals should not limit the use of Rule 54(b)

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23. The present case is illustrative of these detrimental, if not absurd, results. Here, payment of a liquidated and undisputed debt in the amount of $18,914,408 for goods sold, delivered and in use by GE has been delayed by the mere allegation of an unproven and unliquidated counterclaim involving an alleged expenditure by the counterclaimant of less than $2 million, which GE alleges it seeks to recover for the ultimate benefit of the United States Government. *See* GE's Answers to Interrogatories Nos. 61 and 74 (266a-272a, 278a-282a).

The remainder of GE's counterclaim is not for any out-of-pocket losses. Rather, GE claims that by providing Curtiss-Wright with assistance in performance of the 21 contracts it prevented Curtiss-Wright from incurring a major default on the contracts, thereby saving Curtiss-Wright in excess of $52 million which GE now claims it is entitled to recover on the theory that Curtiss-Wright has been "unjustly enriched." *See* GE's Answers to Interrogatories Nos. 54, 61 and 74 (264a-266a, 273a-282a). Despite its unjust enrichment theory, in its appellate brief below GE conceded that Curtiss-Wright "lost substantial sums of money" in its performance of the subcontracts. *See* Brief for Appellant General Electric Company at 3 (filed in the Third Circuit Court of Appeals on October 24, 1978).

Thus, GE takes the ludicrous position that, if Curtiss-Wright had defaulted Curtiss-Wright would have suffered a net loss in excess of $52 million, but because of GE's technical assistance Curtiss-Wright remains liable to GE not only for the alleged cost of the assistance, $1.912 million, but also for the same $52 million although it completed the contracts! *See* the dissenting opinion of Judge Gibbons below sur the denial of the petition for rehearing. 599 F.2d at 1263 (257a).

24. The remedy of summary judgment will not often be available, especially in complex litigation where factual issues are inevitable and the discovery required to reach the stage where summary judgment can even be considered is often time consuming. Any doubt as to the existence of a genuine issue of fact must be resolved against the party moving for summary judgment. *See generally* 6 *Moore's Federal Practice, supra,* ¶ 56.15.

for the convenience of its own calendar. As Judge Gibbons has aptly stated:

> "In commercial litigation it requires little imagination for lawyers to conjure up facially plausible though factually weak counterclaims. Experienced lawyers and judges are all too familiar with the possibilities for delay inherent in liberal federal discovery rules. District judges on the scene are particularly well situated to exercise informed judgment as to when the entry of a final judgment on a complaint will remove the incentive for time consuming and costly litigation over 'imaginative' counterclaims. They are, moreover, conscious of the fact that resolution, favorably or unfavorably, of a legal issue dispositive of the plaintiff's claim will frequently produce a climate in which serious settlement negotiations will commence and often succeed. The concern of appellate judges for their own caseloads should not blind them to the reality that by limiting the use of Rule 54(b) they are depriving their brothers in the district court of a significant tool in the management of trial court caseloads." Dissenting opinion of Judge Gibbons below sur denial of petition for rehearing. 599 F.2d at 1263 (256a).

B. The Third Circuit's holding that the mere pendency of a counterclaim with the possibility of a setoff is a barrier to the entry of final judgment under Rule 54(b) absent "unusual or harsh circumstances" is ill-defined and ill-considered and ignores the interrelationship between Rules 54(b) and 62(h).

There is simply no basis in the federal rules for the Third Circuit's position that the mere possibility of a future setoff, absent "unusual or harsh circumstances," precludes the district

court from entering final judgment and enabling plaintiff to execute thereon. *See* II A, *supra,* at 20-23.

Rule 54(b) was designed to permit the *entry* of final judgment on less than all the claims in litigation when there is no just reason for delay. It is apparent that any and all questions relating to the effect of a subsequent judgment or judgments in the cause were intended to be considered under Rule 62(h): This rule provides:

> "(h) Stay of Judgment as to Multiple Claims or Multiple Parties. When a court has ordered a final judgment under the conditions stated in Rule 54(b), *the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary* to secure the benefit thereof to the party in whose favor the judgment is entered." Fed. R. Civ. P. 62(h) (emphasis added).

The language of Rule 62(h) leaves no doubt that all relevant questions of possible setoffs, solvency and economic duress are properly to be considered within the context of that rule. Under Rule 62(h) the court is empowered to fashion remedies to deal with these and other factors which may bear upon the enforcement of a Rule 54(b) money judgment "until the entering of a subsequent judgment or judgments" on the remaining claims.

Depending on the facts of each case, the court may conclude that the pending counterclaim either warrants a stay of enforcement,[25] does not warrant a stay,[26] or necessitates the

25. *See, e.g., Omark Industries, Inc. v. Lubanko Tool Co., Inc.*, 266 F.2d 540 (2d Cir. 1959).

26. *See, e.g., In re Massachusetts Helicopter Airlines, Inc.*, 469 F.2d 439, 442 n.4 (1st Cir. 1972); *Robbins Flooring, Inc. v. Federal Floors, Inc.*, 445 F. Supp. 4 (E.D.Pa. 1977); *Almar Supply Co. v. Weber-Stephen Products Co.*, 15 Fed. R. Serv. 2d 853 (E.D. Pa. 1971).

imposition of conditions to secure the benefits of the judgment to the party in whose favor the judgment was entered.[27]

In cases such as the present, when the pendency of a counterclaim does not otherwise present a just reason for delay, the counterclaim should be viewed as a neutral factor in the Rule 54(b) analysis. This conclusion is not only mandated by *Cold Metal* but also because there exists at least an equal potential that a counterclaimant, such as GE, will fail to prove its case.[28]

In every case, however, it is clear that where otherwise there "is no just reason for delay" economic considerations such as setoff, solvency, or economic duress are relevant only to questions of enforcement under Rule 62(h). The Third Circuit has mistakenly attempted to convert Rule 54(b) into a rule which governs the timing of the enforcement of judgments. By its very terms, however, Rule 54(b) has nothing to do with enforcement of judgments and contains no mechanism to deal with any factors which may bear upon that issue. In its opinion below and in *Allis-Chalmers,* the Third Circuit, contrary to the great weight of authority,[29] has inexplicably ignored Rule 62(h).

27. *See, e.g., Norris Manufacturing Co. v. R. E. Darling Co., Inc.*, 315 F.2d 633 (4th Cir. 1963); *Bond Industrial Equipment Sales Co. Inc. v. Whiting Corp.*, 114 F. Supp. 161 (S.D.N.Y. 1953).

28. *See* Judge Rosenn's dissenting opinion below, 597 F.2d at 39 (229a). *See also,* Judge Gibbons' dissenting opinion below sur denial of the petition for rehearing, 599 F.2d at 1262 (255a): "Common sense suggests that where both parties are solvent the party whose claim is liquidated in amount and reduced to judgment generally has the stronger claim to possession of the disputed fund during the litigation of the remaining claims." Other commentators are in accord with Judge Gibbons' view. *See* Comment, 56 B.U.L. Rev. 579, 592-93 (1976); Note, 54 N.C.L. Rev. 1265, 1274 (1976).

29. The cases cited in notes 25-27, *supra,* make clear that Rule 62(h) provides the district court with the options necessary to deal with all questions of enforcement of judgments entered under Rule 54(b). Numerous other decisions leave no doubt that the Third Circuit is improperly utilizing Rule

(Cont'd)

In this case, in lieu of properly deferring to Rule 62(h) the Third Circuit has reached what it concedes is a harsh result from Curtiss-Wright's point of view by holding that a pending counterclaim posing the possibility of setoff is a barrier to the entry of a final money judgment under Rule 54(b) absent "unusual or harsh circumstances." The court, moreover, has compounded this error by failing to provide a coherent definition or even a clear example of "unusual or harsh circumstances." The only hint of what the Third Circuit intends appears in a cryptic footnote in *Allis-Chalmers* describing such circumstances as those "factors involving considerations of solvency, economic duress, *etc.*" (emphasis added).[30]

The standard of "unusual or harsh circumstances" as set forth by the Third Circuit not only fails to provide the district

(Cont'd)

54(b) to deal with considerations, such as possible setoffs, which are appropriate for disposition under Rule 62(h). *See, e.g., Gutor International AG v. Raymond Packer Co., Inc.*, 493 F.2d 938 (1st Cir. 1974); *Navajo Tribe of Indians v. United States*, 364 F.2d 320 (Ct.Cl. 1966); *Ziegler Chemical and Mineral Corp. v. American Gilsonite Co.*, 332 F.2d 668 (9th Cir. 1964); *Wisconsin Liquor Co. v. Park & Tilford Distillers Corp.*, 267 F.2d 928 (7th Cir. 1959); *F. & M. Schaefer Corp. v. Electronic Data Systems Corp.*, 430 F. Supp. 988 (S.D.N.Y. 1977); *Beaunit Corp. v. Glentex Corp.*, Civ. No. 76-369 (S.D.N.Y. Oct. 7, 1977) (slip); *St. Marie & Son, Inc. v. Hartz Mountain Corp.*, 414 F. Supp. 71 (D. Minn. 1976); *Tire Sales Corp. v. Cities Service Oil Corp.*, 410 F. Supp. 1222 (N.D. Ill. 1976); *Curtis Publishing Co. v. Church, Rickards & Co., Inc.*, 58 F.R.D. 594 (E.D. Pa. 1973); *Reines Distributors, Inc. v. Admiral Corp.*, 31 F.R.D. 187 (S.D.N.Y. 1962), *rev'd on other grounds*, 319 F.2d 609 (2d Cir. 1963); *Metro Corrugated Containers, Inc. v. Owens-Illinois Glass Co.*, 185 F. Supp. 359 (E.D.N.Y. 1960); *Morand Bros. Beverage Co. v. National Distillers and Chemical Corp.*, 25 F.R.D. 27 (N.D. Ill. 1959); *Emerson Radio & Phonograph Corp. v. Hendrix*, 20 F.R.D. 572 (S.D.N.Y. 1957); *cf. Bethlehem Steel Corp. v. Tishman Realty & Construction Co., Inc.*, 72 F.R.D. 33, 39 (S.D.N.Y. 1976).

30. 521 F.2d at 366 n.14. The majority opinion in the present case saw fit not to elaborate. The meaning of "etc." remains a mystery. The Third Circuit may be unable to agree on the definition of this factor as demonstrated by the split vote on the petition for rehearing *en banc* in this case (246a-247a).

courts with any meaningful guidance, but also is obviously unworkable under Rule 54(b).

The court has erroneously compelled the district court to consider factors properly relevant only to Rule 62(h) when exercising discretion under Rule 54(b). By so dictating the Third Circuit has effectively precluded the district court from ever entering a final judgment under Rule 54(b) when as here there is a pending monetary counterclaim and has reduced Rule 62(h) to a virtually useless appendage to the Federal Rules of Civil Procedure. This result is contrary to the internal logic and structure of the rules.[31]

To the extent that considerations of setoff, "solvency, economic duress, etc." are factors which may in some cases be relevant to the question of enforcement, these factors are obviously properly considered within the context of Rule 62(h) which is intended for just such situations.[32]

31. Rule 62(h) was expressly adopted to deal only with Rule 54(b) final judgments. *See* Advisory Committee Note to 1946 Amendment, 28 U.S.C.A. Fed. R. Civ. P. 54(b).

32. The *Allis-Chalmers* majority opinion itself, though ignoring Rule 62(h), unintentionally reveals that the standard of "unusual or harsh circumstances," *i.e.*, factors of "solvency, economic duress, etc." is relevant only to the issue of whether plaintiff should be permitted immediate enforcement of his judgment. The court queried:

> "Is [defendant's] financial condition such that [plaintiff] might in any way be prejudiced by postponing *execution* on its judgment until [defendant's] counterclaim was fully adjudicated? Conversely, is [plaintiff's] financial condition such that [defendant] might be prejudiced if [plaintiff] was allowed immediate *execution* on its judgment before adjudication of [defendant's] counterclaim?" 521 F.2d at 365 (emphasis added).

Whether *execution* should be "immediate" or "postponed" is obviously a matter for disposition under Rule 62(h), as this matter is one of enforcement.

C. The district court's entry of final judgments in this case is well within the letter and the spirit of Rule 54(b) under any logical interpretation thereof, and the final judgments should be reinstated.

As we have indicated in Point I, *supra*, a basic purpose of Rule 54(b) is to avoid injustice caused by a delay in judgment on a distinctly separate claim in a case involving multiple claims.

In the present case there is no question that irrespective of whose standard is used to evaluate injustice or hardship, that standard has been satisfied insofar as Curtiss-Wright is concerned. It hardly seems necessary to state a reason in holding that depriving Curtiss-Wright of almost $19 million dollars to which it is presently entitled is unjust and harsh.

The district judge below, in his analysis of the factors which he considered in connection with his entry of final judgment, had little difficulty appreciating that due to the injustice arising from the disparity between the prejudgment rate of only 6 percent simple interest per year and modern day interest rates,[33] Curtiss-Wright would suffer "daily financial losses" for a protracted period from a failure to enter final judgment (198a).

In his dissent below, Judge Rosenn likewise considered Curtiss-Wright's financial loss as an appropriate factor favoring the entry of final judgment:

> ". . . If this court were to hear the appeal certified by the district court and to sustain the district court's judgment, Curtiss-Wright could execute immediately. Because of the disparity between six percent simple interest and the much higher interest rates now prevalent in the marketplace, Curtiss-Wright will lose (as GE

33. As of the date of this brief the "prime rate" of interest is 15.5 percent.

> conceded at oral argument) over a million dollars per year until this litigation can be finally consummated. This could conceivably take years to complete.
>
> * * *
>
> . . . [W]hen the judgment is for a very large sum of money, and the current cost of money is exceptionally high, the substantial loss to the creditor caused by further delay must be weighed by the [district] court."[34]

Judge Rosenn also noted that aside from the losses occasioned by the disparity in the interest rates, Curtiss-Wright was unjustly being deprived of the actual use of the money judgment in its own operations.

The reasoning of the district court below and Judge Rosenn in his dissent is in accord with *United Bank of Pueblo v. Hartford Accident & Indemnity Co.*, 529 F.2d 490 (10th Cir. 1976), where the Tenth Circuit considered a delay as brief as 10 months in collecting a $50,000 judgment to constitute "a financial injustice" in light of a high interest rate in the marketplace, and held that the district court had properly considered this factor in its determination to enter final judgment pursuant to Rule 54(b). When the amount of the judgment and length of the delay involved in the present case are compared to that in *United Bank of Pueblo, supra*, it cannot seriously be argued that the district court below abused its discretion by taking into consideration the financial injustice which would result from its failure to enter final judgment.

As set forth in his dissent from the denial of the petition for rehearing, Judge Gibbons would hold that in a civil action

34. 597 F.2d at 37-38 (225a-227a).

between two solvent parties any needless delay in obtaining possession of the benefits to which one is entitled under a valid judgment is the "*precise* 'harsh circumstance' that Rule 54(b) is intended to prevent." 599 F.2d at 1264 (260a). Judge Gibbons' concomitant view[35] is that Rule 62(h) is the appropriate rule under which to consider possible setoffs and other economic factors. This view appears to prevail throughout the federal court system except in the Third Circuit.[36]

The majority opinion below itself acknowledged the obvious injustice to Curtiss-Wright by indicating that from Curtiss-Wright's viewpoint its holding would be "harsh." In spite of the obvious injustice, the court adopted an interpretation of Rule 54(b) that makes the possibility of a setoff in and of itself a "just reason for delay" that apparently can be overcome, if at all, only by a showing of some exaggerated type of harshness or unusual circumstances. This interpretation of the rule affords a type of protection to GE not authorized by Rule 54(b) because, obviously, if any such protection is appropriate it exists under Rule 62(h). This erroneous interpretation also places an unreasonable burden upon Curtiss-Wright, especially in light of the ambiguous guidelines that the appellate court has baselessly adopted. These "guidelines" have no effect other than to confuse and obstruct the exercise of the district court's discretion under Rule 54(b).

Rule 54(b) is a mechanism to avoid injustice — not cause it. The rule was adopted to avoid injustice occasioned by delay in final resolution of a judgment where the adjudicated claim is "distinctly separate" from the remaining claims in suit.[37] That

35. Expressed in his dissenting opinion in *Allis-Chalmers*, 521 F.2d at 373-74.

36. *See* notes 25-27, 29, *supra*, and the accompanying text at 26-27.

37. 28 U.S.C.A. Fed. R. Civ. P. 54(b), Advisory Committee Note to the 1946 Amendment, *quoted in relevant part in* note 4, *supra*. The Advisory (Cont'd)

the circumstances in this case meet every criteria under any logical interpretation of the letter and spirit of the rule is beyond question.

The Third Circuit has turned a rule which was intended to grant relief to a judgment creditor in circumstances such as exist in this case into one judically rewritten to afford unintended benefit to a judgment debtor solely because of the existence of an unadjudicated counterclaim. The appellate court is in error, has misapplied the rule and has reached an unjust result which in future cases can only lead to a continuing denial of justice to litigants. The position of the Third Circuit with respect to Rule 54(b) must be rejected.

If ever there were a case for which Rule 54(b) was intended

(Cont'd)

Committee Note is of special interest for a number of reasons. First, it nowhere indicates that money judgments on distinctly separate claims are to be excluded from possible 54(b) certification. Second, the Note specifically refers to Rule 62(h) for stays of enforcement of judgments certified under the rule. Thus the Note fully supports the position taken in this brief that final money judgments on distinctly separate claims can be entered under the rule in the district court's discretion and that factors which are relevant to enforcement are to be considered in the context of Rule 62(h). The Note's reference to "infrequent harsh case" apparently has been the source for the Third Circuit's standard of "unusual or harsh circumstances." The language in the Note, however, appears to reflect nothing more than the Advisory Committee's opinion that situations involving "distinctly separate claims" available for Rule 54(b) certification will be exceptional. The Note is basically concerned with the confusion which original Rule 54(b) engendered because the rule in its original form made it unclear when judgments were final and when the time for appeal began to run. There is absolutely nothing in the Note which supports the Third Circuit's view that the loss of benefits of a money judgment resulting from delay requires some sort of special hardship beyond the delay itself before final judgment may be entered. Interestingly one commentator has noted: "[T]he historical context of the amendment seems to indicate that the [Note's] reference to the necessity of an infrequent, harsh case was inadvertent and was intended to reduce the exorbitant flow of appeals of *non-final* adjudications that had developed under the former rule." Note, 54 N.C.L. Rev. 1265, 1272-73 (1976) (emphasis added).

it is the case before this Court. Curtiss-Wright has demonstrated that it has met every criteria of the rule and Supreme Court precedent, and has satisfied any rational conception of injustice or harshness which could have been anticipated by the framers of the rule.

CONCLUSION

For the foregoing reasons, the judgment of the Third Circuit Court of Appeals (262a) should be vacated and the case should be remanded to the court of appeals with a direction to reinstate the orders of final judgments of the district court entered on July 28, 1978 (200a) and August 29, 1978 (214a) respectively.

Respectfully submitted,

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No. 79-105

CURTISS-WRIGHT CORPORATION,
Petitioner,

v.

GENERAL ELECTRIC COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-105

CURTISS-WRIGHT CORPORATION,
Petitioner,

v.

GENERAL ELECTRIC COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR RESPONDENT

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Does Rule 54(b), Federal Rules of Civil Procedure, which permits more than one appeal in a case only in the "infrequent harsh case," sanction a District Court's attempting to make final an Order adjudicating fewer than all of the claims between the parties for reasons which would apply to most cases involving a money judgment?

2. Did the Court of Appeals correctly hold that under Rule 54(b), an adjudication of only one of the many claims between the parties was not properly entered as a "final judgment" when the party in whose favor it ran (i) showed no specific hardship it would

suffer if entry of final judgment awaited the end of litigation, (ii) faced substantial counterclaims, and (iii) itself was primarily responsible for the consequence of which it complains because of its long delay in asserting claims?

3. Does a case become an "infrequent harsh case" merely because it involves a large sum of money, and statutory interest rates are below current market rates?

COUNTERSTATEMENT OF THE CASE

Respondent General Electric Company ("General Electric") serves as a prime contractor of the United States Navy ("Navy") with responsibility for the procurement and administration of supply and service contracts for the Naval Nuclear Program. Starting in 1968, General Electric entered into a series of subcontracts with Petitioner Curtiss-Wright Corporation ("Curtiss-Wright") for the manufacture of large nuclear components used in the propulsion system of Naval Nuclear vessels, for a fixed price. The first 21 of these contracts, having a value of almost $215,000,000, are involved in this action (Appendix ("A.") 8-9).

In the performance of these contracts, Curtiss-Wright incurred substantial cost overruns, which became known to Curtiss-Wright at least by 1971 (Transcript of the Deposition of T. Roland Berner, Chairman of the Board and President of Curtiss-Wright, at 257, in the District Court Record on file with the Clerk of this Court). In 1975, Curtiss-Wright filed a Request for Extraordinary Contractual Relief with the Navy, pursuant to Public Law 85-804, 50 U.S.C. § 1431, covering the 21 contracts involved in this action, asking the Government, in its discretion, in the interests of

national defense, to grant it additional monies for performing its contracts. In the course of its dealing with the Request, the Navy indicated that it would not entertain the Request unless Curtiss-Wright certified that it had no contractual remedy against General Electric (*see, e.g.*, Court of Appeals Appendix 174, on file with the Clerk of this Court). Only then—more than six years after the principal events allegedly supporting its claims occurred—did Curtiss-Wright, on April 30, 1976, file its Complaint in this action (A. 6-41).

The original Complaint recited 16 Counts ranging from fraud and misrepresentation and mistake to breach of contract, all in an effort to shift to General Electric the burden resulting from Curtiss-Wright's performance problems. The Complaint included allegations that General Electric had made certain oral representations, for example, that Curtiss-Wright would realize a specific profit on these fixed-price contracts which contained no provision for reimbursement of cost overruns; that General Electric had promised a certain volume of yearly business to Curtiss-Wright regardless of Curtiss-Wright's performance and competitive posture; and that General Electric had conspired with the Navy to defraud Curtiss-Wright and deprive it of further Naval Nuclear Program business (A. 9-10, 12, 21, 22). Curtiss-Wright demanded, *inter alia,* that it be awarded damages as the result of "fraud," and that its fixed-price contracts be reformed into cost-plus contracts giving it a profit.

The principal allegations of the Complaint were directed to events which occurred years before the action was commenced. The fraud in the inducement claims

were based upon representations which allegedly occurred primarily in 1968 when Curtiss-Wright entered the business of procuring large components for the Naval Nuclear Program, and prior to its 1969 agreement to expand significantly its participation in that Program (A. 9-11; *see also* Plaintiff's Response to Defendant's Interrogatories to Plaintiff, Nos. 3, 6-11, in the District Court Record). Most of the other claims were based upon allegations of "mutual mistake" or overreaching by General Electric, in this same early period, which Curtiss-Wright claimed resulted in the contracts not making "adequate provision" for the difficulty of the work (A. 25).

In response to the Complaint, General Electric not only denied the Curtiss-Wright allegations and interposed several affirmative defenses, but also filed Counterclaims seeking a recovery of some $54,000,000 (A. 42-70; Defendant's Response to Plaintiff's Second Set of Interrogatories to Defendant, *e.g.*, No. 69, in the District Court Record). The gist of General Electric's Counterclaims was that Curtiss-Wright had failed to perform these contracts competently, as it had represented that it could and would do; and that, as a consequence of Curtiss-Wright's failure to perform competently, General Electric was required to render extraordinary technical and managerial assistance to Curtiss-Wright, which enabled Curtiss-Wright eventually to manufacture and deliver the components that Curtiss-Wright was contractually obligated to deliver and to avoid even further losses and substantial termination-for-default damages (A. 63-69).

After issue had been joined on its original Complaint, Curtiss-Wright amended it to add three Counts alleging that it was entitled to final payment, aggregating approximately $19,000,000, under these contracts, de-

spite its assertion in this action of other claims arising under them (A. 78-80, 208-09). This final payment was withheld by General Electric in reliance upon a clause, appearing in each of the 21 contracts, providing that "Seller [Curtiss-Wright] . . . agree[s] as a condition precedent to final payment, that the Buyer [General Electric] and the Government . . . are released from all liabilities, obligations and claims arising under or by virtue of this order" (Terms and Conditions of Purchase, Article 5c, A. 103).[1] Curtiss-Wright offered a qualified release, purporting to reserve "only" the claims of more than $60,000,000 made in its Complaint (A. 95-96; Plaintiff's Response to Defendants' Interrogatories to Plaintiff, Nos. 63-76 in the District Court Record). After receiving the views of the Navy that the release clause should not be waived, General Electric declined to make final payment without an appropriate release.[2]

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[1] Each of the subcontracts (with one apparently inadvertent exception) also contains the following standard form invoicing instructions:

> "The final invoice(s) shall be marked 'FINAL' on the face of the invoice to signify billing is complete under this Order and that all claims on this Order against General Electric Company M.A.O. and/or the Government have been resolved." (A. 205).

The Terms and Conditions of Purchase also provide that:

> "Except as otherwise provided in this order, e.g., progress payments, no payment by Buyer shall be due until thirty (30) days after (1) receipt of an acceptable invoice and appropriate evidence that Seller has met all the requirements of the order, or (2) receipt of the supplies at destination, whichever last occurs." (Article 5a, A. 103).

[2] The Navy stated:

> "The claims which Curtiss-Wright proposes be excepted from the claims release were filed years after the contracts were entered, and in many cases years after the occurrence of the

Upon cross-motions for partial summary judgment directed to the release issue, the District Court held that Curtiss-Wright was entitled to final payment notwithstanding the release clause (A. 172).

At the same time that Curtiss-Wright moved for partial summary judgment, it also filed a motion, based on several grounds, to dismiss General Electric's Counterclaims and to strike certain affirmative defenses including the right of set-off. That motion was denied (A. 173-74).

Curtiss-Wright then moved for a certification of the District Court's orders awarding it final payment as final judgments under Rule 54(b). The District Court recognized that "[b]oth the plaintiff and the defendant appear to be financially sound. Therefore, plaintiff's financial condition is such that it would be able to await the payment of these sums, and defendant's economic status is such that defendant will be able to satisfy the judgment whenever final judgment is entered" (A. 198). It recited that Rule 54(b) certifications "should be reserved for the infrequent harsh

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events on which the claims are based. Curtiss-Wright was or should have been fully cognizant that this late identification of claims likely would result in withholding of final payment until the claims were resolved. Based on the above, it is clear that the existence of outstanding claims at the time when final payment otherwise would be due is the result of Curtiss-Wright's own actions, the consequences of which were or should have been known to Curtiss-Wright.

"Curtiss-Wright's present pursuit of claims against [General Electric] under its subcontracts requires, by the terms and conditions of the subcontracts, a withholding of monies until such time as an unqualified claims release is effected." (A. 152-53).

Navy approval was required for the determination of final price, and thus for final payment, by the prime contracts between the Navy and General Electric and by the subcontracts between Curtiss-Wright and General Electric (A. 146).

case because of the overload which would otherwise result in the federal appellate courts" (A. 197). Nonetheless, it reasoned that this requirement was met solely because (a) a large sum was involved and (b) the statutory interest rate of six percent to which Curtiss-Wright would be entitled under applicable New York law was below present market rates (A. 198). A delay in this circumstance was characterized as a "great injustice" (A. 198). The District Court also stated that the presence of General Electric's Counterclaims was a factor weighing against certification, but was one "outweighed" by those it relied upon (A. 199).

In moving for entry of a Rule 54(b) certification, Curtiss-Wright had attempted no showing of specific adverse consequences upon itself flowing from a delay in payment, beyond the receipt of interest at the statutory rate rather than current market rates. There was no suggestion, for example, that cash flow problems or any other specific corporate problem would ensue.

On motions of General Electric, the District Court stayed the Orders granting Rule 54(b) certifications without bond, finding that "the financial position of . . . General Electric Company is sufficient to provide unquestionable security for Plaintiff. . . ." (A. 203).

On the appeal by General Electric, the United States Court of Appeals for the Third Circuit vacated the Orders granting Rule 54(b) certification, and therefore did not reach the merits of the release clause issue also raised by General Electric. *Curtiss-Wright Corp.* v. *General Electric Co.*, 597 F.2d 35 (3d Cir. 1979), A. 220. Following its earlier decision in *Allis-Chalmers Corp.* v. *Philadelphia Electric Co.*, 521 F.2d 360 (3d Cir. 1975), the Court held that "[i]n the absence of unusual or harsh circumstances"—such as ones "involv-

ing considerations of solvency, economic duress, etc." —and in the face of substantial counterclaims, a Rule 54(b) final judgment should not be entered. 597 F.2d at 38. A timely petition for rehearing and a suggestion for rehearing *en banc* were denied. 599 F.2d 1259 (3d Cir. 1979).

SUMMARY OF ARGUMENT

I. The general rule in Federal appellate procedure is that there should be only one appeal in a case, after a judgment which adjudicates all the issues on the merits and leaves nothing to be done but the execution of the judgment. This Court has consistently held that this rule should be strenuously enforced because it serves the interests of justice in obtaining the fairest and most expeditious disposition of the claims of all litigants; the most recent such holding was *Coopers & Lybrand* v. *Livesay,* 437 U.S. 463 (1978).

Rule 54(b) was intended to be a narrow exception to the general rule, an exception strictly limited to the "infrequent harsh case." This was the touchstone defined by the Advisory Committee on Rules for Civil Procedure ("Advisory Committee"), explicating the 1946 amendment permitting the entry of judgment upon fewer than all claims in a case with multiple claims. The "infrequent harsh case" test has been invariably applied by the Federal courts in passing on applications for final judgment under Rule 54(b), and it was applied by the Court of Appeals in this case.

As the Court of Appeals held, application of that test establishes that there should have been no Rule 54(b) certification of final judgment in this case. Petitioner did not make a showing, and indeed did not

genuinely attempt to make any such showing, of unique hardship or other special circumstances, that would satisfy the "infrequent harsh case" standard. Quite to the contrary, the factors proffered by Petitioner and accepted by the District Court, essentially that a significant sum of money was involved and that the market interest rates were above the statutory rate New York has provided for judgments, would be generally applicable to money judgment cases.

II. A. In the Courts below, Petitioner did not shoulder that burden that Rule 54(b) imposes upon an applicant for certification; it made no showing of special hardship or need for these funds as the Rule demands. Indeed, there was not even any attempt to show that lack of these funds would inhibit any corporate activities. Furthermore, Petitioner was not so desirous of these funds that it pressed its claims diligently and without delay. To the contrary, this case commenced in April 1976 rests primarily upon allegations as to representations made and contract negotiations completed by early 1969. Any delays in receipt of funds to which it may be entitled reflect Curtiss-Wright's own delays in raising and gaining resolution of its alleged claims.

B. The idea of equal justice under law is patently violated by establishing a dollar-amount test for certification under Rule 54(b), as Petitioner demands in its insistence that the mere presence of a large sum of money defines a hardship so severe as to require Rule 54(b) certification. Such an unseemly test would generally favor the rich over the poor. In any event, if the time when an appeal should be taken and decided is to be defined by dollar amount, that is properly for the legislature, not the judiciary, to determine. *Coopers & Lybrand* v. *Livesay, supra,* 437 U.S. at 472.

C. The rate of interest to be paid on judgments is likewise a matter for the legislative and not the judicial branch. It was improper for the District Court to rely on the fact that market rates of interest were greater than that provided by the undisputably applicable New York law as a factor supporting Rule 54(b) certification. A Federal District Judge in a diversity case should not substitute his own feelings as to the proper interest rate on judgment for the statutory rate prescribed by the applicable State Law.

There is no injustice even if the legislature should provide that there be no interest on judgments or that the interest rate should be relatively low. Various Congressional enactments illustrate this, for different Federal statutes bear different provisions for interest. Further illustrating that the subject is indeed one for treatment by legislation, a Bill now before the Congress, passed by the Senate, would make the applicable rate of interest on judgments in Federal Courts that provided in the Internal Revenue Code. State legislatures likewise from time to time change the rates applicable to interest on judgments. For a District Judge to modify the legislatively defined rate because he believes it inadequate in a particular case is to invade the legislative province.

In any event, disregarding the well-established finality rule would be a destructive solution to any problem involving the inadequacy of statutory interest rates. Normal, orderly judicial administration would suffer and many litigants whose turn in court was delayed would lose interest, particularly if their claims were unliquidated.

D. Rule 54(b) has been appropriately applied where there are indeed present such unique circum-

stances as to reflect the likelihood of assets being withdrawn. This Court has analogized Rule 54(b) to doctrines permitting interlocutory appeal from orders which bear "irreparable" consequences. No such circumstances or consequences are shown here as would justify certification under Rule 54(b).

III. A. Inasmuch as the Court below relied upon the existence of substantial counterclaims as only one factor, albeit a potent one, militating against the permissibility of Rule 54(b) certification, Petitioner is addressing only an imaginary issue in contending that there should be no *per se* rule precluding Rule 54(b) certifications when there are unadjudicated counterclaims. The Third Circuit's consideration of the existence of counterclaims as a strong factor is in accord with other authority and with just and effective judicial administration. It makes little practical or legal sense to order the payment over of monies which thereafter in the same litigation may well have to be returned with a larger judgment ultimately awarded the other party.

B. Petitioner goes so far as to contend that the existence of counterclaims may not even be considered in Rule 54(b) certifications. The short answer is that nothing in the Rule or in the Advisory Committee Notes suggests that the pendency of counterclaims was to be considered irrelevant in determining whether a case was an "infrequent harsh case." To the contrary, it is clear that under Rule 54(b), as amended in 1946, "it will probably be a rare case in which the Court will find it advisable to enter a final, appealable judgment

on a claim or compulsory counterclaim prior to judgment on the other side of the case. . . ." 3 *Moore's Federal Practice,* ¶ 13.17 (2d ed. 1979).

C. Further, Petitioner urges that factors such as hardship or the existence of counterclaims may not be taken into account by the District Court in considering whether to grant an application for Rule 54(b) certification, because these are factors to be considered in ruling upon an application for stay under Rule 62(h). In historical fact, however, Rule 62(h) was derived from language which appeared in Rule 54(b) until 1946; it is unreasonable to contend that those who were relying upon District Courts to adhere to the "infrequent harsh case" touchstone under Rule 54(b) were somehow precluding the selfsame District Courts from adhering to that touchstone merely because they had transferred some of the phraseology of Rule 54(b) to Rule 62(h). Rules have different functions; and nothing supports the notion that a fact pertinent to decision in the application of one Federal Rule of Civil Procedure is thereby excluded from consideration under another of the Rules. In particular, while Rule 62(h) is not concerned with the number of appeals, continuing allegiance to the "infrequent harsh case" test in passing on Rule 54(b) applications serves the fundamental policy against burdening the Courts of Appeals with piecemeal appeals.

IV. There can be no question that Courts of Appeals have the authority and the duty to review Rule 54(b) certifications for abuse of discretion. So this Court held in *Sears, Roebuck and Co.* v. *Mackey,* 351 U.S. 427,

437 (1956). Such review is essential; it is imperative, for example, to insure that District Courts not become so lax or routine in Rule 54(b) certifications that the adjudication of appeals from judgments disposing of all claims in a case are not unduly delayed or diverted. The judgment of the Court of Appeals is entitled to be affirmed unless the Court below is deemed to have misconceived its review function. *Cf. National Labor Relations Board* v. *Pittsburgh S.S. Co.,* 340 U.S. 498, 502-503 (1951). There was here no such misconception. The review function was properly and correctly performed in accordance with law. The judgment below should be affirmed.

ARGUMENT

I. RULE 54(b) PERMITS AN EXCEPTION TO THE STRONG FEDERAL POLICY AGAINST PIECEMEAL APPEALS ONLY IN THE "INFREQUENT HARSH CASE."

A. Orders Adjudicating Fewer Than All Claims May Be Certified As Final Judgments Under Rule 54(b) Only In The "Infrequent Harsh Case."

The relationship between Rule 54(b) and the strong Federal policy against piecemeal appeals is at the heart of this case. Petitioner's position, as we shall show, is nothing more or less than the contention that Rule 54(b) intends a routine if not automatic exception to that policy in cases involving multiple claims and multiple parties. The vice of this position is that it does not accord with the intention and proper purpose of Rule 54(b), which was to permit an appeal in such cases only rarely, only in the "infrequent harsh case."

The quoted words appear in the Advisory Committee Note issued in 1946 when the Rule was amended and

put in substantially its present form as to multiple claim cases:[3]

> "After extended consideration, it [the Advisory Committee] concluded that a retention of the older federal rule was desirable, and that this rule needed only the exercise of a discretionary power to afford a remedy in the *infrequent harsh case* to provide a simple, definite, workable rule." Note of Advisory Committee on Rules for Civil Procedure, 5 F.R.D. 433 at 473 (1946).[4]

The explanation of a Federal Rule provided by the Advisory Committee Note reflects the intention and history of the Rule. *Eisen* v. *Carlisle & Jacquelin,* 417 U.S. 156, 173-174, 176, 177 (1974). "The fact that this Court promulgated the rules as formulated and recommended by the Advisory Committee does not foreclose consideration of their validity, meaning or consistency. But in ascertaining their meaning the construction given to them by the Committee is of weight." *Mississippi Publishing Corp.* v. *Murphree,* 326 U.S. 438, 444 (1946); *accord, Selph* v. *Council of City of Los Angeles,* 593 F.2d 881, 883, n. 1 (9th Cir. 1979); *Maryland Casualty Co.* v. *W. S. Conner,* 382 F.2d 13, 16 (10th Cir. 1967).

Accordingly, the Advisory Committee's pronouncement of the intention and scope of Rule 54(b) has been

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[3] *See* 6 *Moore's Federal Practice* ¶ 54.27 [2.-3] at 328-29 (2d ed. 1976). In 1961, the Rule was again amended to permit entry of a final judgment against one or more, but fewer than all, of the parties in a multiple party action, if the requisite certification was made. *Id.*

[4] It is clear from the text of the Advisory Committee Note that the "older federal rule" referred to was the strong rule against piecemeal appeals.

Emphasis is added and citations are omitted from quotations throughout this Brief.

recognized as fashioning the proper touchstone for judicial application of the Rule. Consistently the Courts have recognized the "infrequent harsh case" requirement. *See, e.g., Brunswick Corp.* v. *Sheridan,* 582 F.2d 175, 183 (2d Cir. 1978); *Campbell* v. *Westmoreland Farm, Inc.,* 403 F.2d 939, 942 (2d Cir. 1968); *Panichella* v. *Pennsylvania Railroad Co.,* 252 F.2d 452, 455 (3d Cir. 1958), *cert. denied,* 361 U.S. 932 (1960); *Allis-Chalmers Corp.* v. *Philadelphia Electric Co.,* 521 F.2d 360 (3d Cir. 1975); *Huckeby* v. *Frozen Food Express,* 555 F.2d 542, 550 (5th Cir. 1977); *U.S. General, Inc.* v. *City of Joliet,* 598 F.2d 1050, 1051 n. 1 (7th Cir. 1979); *Columbia Broadcasting System, Inc.* v. *Amana Refrigeration, Inc.,* 271 F.2d 257, 259 (7th Cir. 1959), *cert. denied,* 362 U.S. 928 (1960); *Gas-A-Car, Inc.* v. *American Petrofina, Inc.,* 484 F.2d 1102, 1105 (10th Cir. 1973); *Liquilux Gas Services of Ponce, Inc.* v. *Tropical Gas Co.,* 48 F.R.D. 330, 332 (D.P.R. 1969). In the apropos words of Judge Hastie:

> "54(b) orders should not be entered routinely or as a courtesy or accommodation to counsel. The power which this Rule confers upon the trial judge should be used only 'in the infrequent harsh case' as an instrument for the improved administration of justice and the more satisfactory disposition of litigation in the light of the public policy indicated by statute and rule. See 6 Moore, Federal Practice, 1953, 264-65." *Panichella* v. *Pennsylvania Railroad Co.,* 252 F.2d 452, 455 (3d Cir. 1958).

"[E]ntry of final judgment under Rule 54(b) is not to be done lightly, particularly when the action remains pending as to all parties." *Brunswick Corp.* v. *Sheridan, supra,* 582 F.2d at 183 (Friendly, J.). "[T]here must be some danger of hardship or injustice through delay which would be alleviated by immediate appeal."

Western Geophysical Co. of America, Inc. v. *Bolt Associates, Inc.*, 463 F.2d 101, 103 (2d Cir.), *cert. denied*, 409 U.S. 1040 (1972). "[B]oth courts and commentators have expressed the exceptional nature of a Rule 54(b) certification." *Page* v. *Preisser*, 585 F.2d 336, 339 (8th Cir. 1978). The discretion to certify "should be exercised cautiously and infrequently." *Purdy Mobile Homes, Inc.* v. *Champion Home Builders Co.*, 71 F.R.D. 341, 342 (E.D. Wash. 1976), *aff'd*, 594 F.2d 1313 (9th Cir. 1979).

In light of the predominant principle that Rule 54(b) is an exception to the general rule that a final judgment may be entered only upon adjudication of all claims, so that there is but one appeal in the entire case, the burden is on the party seeking certification to show that there is "no just reason" for delaying entry of judgment until the end of the case, as demanded by the rule against piecemeal appeals; he cannot make this showing unless he affirmatively satisfies the "infrequent harsh case" requirement. *See Allis-Chalmers Corp.* v. *Philadelphia Electric Co., supra*, 521 F.2d at 365; 10 Wright & Miller, *Federal Practice and Procedure: Civil* § 2659 at 75-76 (1973). So far is Petitioner from recognizing this bedrock principle that acceptance of its position would generate Rule 54(b) certifications in *every* multiple claim suit, for Petitioner alleges, "[t]he injustice inherent in any delay of a party's ability to enjoy the benefits of a judgment in its favor is alone sufficient to warrant the application of Rule 54(b)" (Brief for Petitioner ("Pet. Br.") 9)). This plea for automatic certification is manifestly at the opposite end of the spectrum from the actual provisions and purposes of Rule 54(b).

B. There Is A Strong Federal Policy Against Burdening The Courts With More Than One Appeal In A Case; The General Rule Is That One Final Judgment, Disposing Of All Claims, Should Be Entered At The Conclusion Of The Entire Case.

The restriction of permissible 54(b) certification to the "infrequent harsh case" accords with the paramount Federal policy against piecemeal appeals and generally prescribing that there shall be but one appeal per case, to be taken after all claims have been completely adjudicated, so that there is a judgment which is a genuinely final judgment.

"The finality requirement in § 1291 evinces a legislative judgment that '[r]estricting appellate review to "final decisions" prevents the debilitating effect on judicial administration caused by piecemeal appeal disposition of what is, in practical consequence, but a single controversy.' " *Coopers & Lybrand* v. *Livesay, supra*, 437 U.S. at 469-70, quoting *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974). "Federal appellate jurisdiction generally depends on the existence of a decision by the District Court that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.' " *Coopers & Lybrand* v. *Livesay, supra*, 437 U.S. at 467, quoting *Catlin* v. *United States*, 324 U.S. 229, 233 (1945). "The case is not to be sent up in fragments . . . ." *Luxton* v. *North River Bridge Co.*, 147 U.S. 337, 441 (1893).

Any benefit which a particular party may derive from a piecemeal appeal "is outweighed by the impact of such an individualized jurisdictional inquiry on the judicial system's overall capacity to administer justice. The potential waste of judicial resources is plain . . . ."

Coopers & Lybrand v. *Livesay, supra,* 437 U.S. at 473. Manifest it is that:

> "[P]articularly in an era of excessively crowded lower court dockets, it is in the interest of the fair and prompt administration of justice to discourage piecemeal litigation. It has been Congress' determination since the Judiciary Act of 1789 that as a general rule 'appellate review should be postponed . . . until after final judgment has been rendered by the trial court.'" *Kerr* v. *United States District Court for the Northern District of California,* 426 U.S. 394, 403 (1976), quoting *Ex Parte Fahey,* 332 U.S. 258, 260 (1947).

The pervasive general policy that there should be but one appeal per case, when all claims have been disposed of finally, demands that the Rule 54(b) exception be confined to the "infrequent harsh case." That policy serving the interests of justice refutes the notion, reflected in the Brief for Petitioner, that 54(b) certifications may be provided routinely and extended on grounds applicable to entire groups of cases.

II. PETITIONER CURTISS-WRIGHT DID NOT EVEN ATTEMPT TO SHOW THAT THIS IS AN "INFREQUENT HARSH CASE." TO THE CONTRARY, THE GROUNDS IT ADVANCES FOR 54(b) CERTIFICATION, THAT A SUM CONSIDERED SUBSTANTIAL IS INVOLVED AND STATUTORILY PRESCRIBED INTEREST RATES ARE BELOW CURRENT RATES, CHARACTERIZE VIRTUALLY ALL MONEY JUDGMENT CASES, AND IN ANY EVENT, ARE INAPPROPRIATE CONSIDERATIONS FOR SUCH CERTIFICATIONS.

A. Petitioner Has Not Attempted To Shoulder Its Burden Of Proving This Is An "Infrequent Harsh Case."

To this point, we have demonstrated that the general rule in Federal appellate practice is that appeals

may lie only from judgments adjudicating all claims, and that the exception provided in Rule 54(b) is applicable only in the "infrequent harsh case." In utter disregard of this well established law, Petitioner rests on an assertion, supported by no authority, that the insistence of the Court below upon "unusual or harsh circumstances" is "unworkable" and "fails to provide the District Courts with any meaningful guidance" (Pet. Br. 28-29). The predicate of Petitioner's position is that Rule 54(b) certifications are to be afforded routinely and as an accommodation. Petitioner stands the law on its head. Petitioner assigns to the Court of Appeals and Respondent the burden of showing that factors exist which create a just reason for delay, whereas in right posture the law mandates that Petitioner has the burden of showing that it has an "infrequent harsh case"—that there is no just reasons for delay—which alone may justify certification under Rule 54(b).

In the Courts below, Curtiss-Wright did not even assay any showing that it has a pressing immediate need for the funds. Indeed, while this dispute was in the Courts below, Curtiss-Wright was so very far from financial hardship that it was able to mobilize extensive resources in a quest for control of Kennecott Copper Corporation, an even larger corporation. *See generally Kennecott Copper Corp.* v. *Curtiss-Wright Corp.*, 584 F.2d 1195, 1198 (2d Cir. 1978). Curtiss-Wright presented not an iota of evidence that the lack of the funds it seeks to recover here affected even slightly its pursuit of that major corporate effort, or of any other corporate activities. Nor has Curtiss-Wright suggested that lack of the contested funds will hinder its prosecution of this lawsuit; and even if it did, this Court has recently held that an order is and

remains unappealable even though the size of the financial burden involved may make it impossible for the plaintiff to continue with the action. *Coopers & Lybrand* v. *Livesay, supra,* 437 U.S. at 473. In any event, the orderly administration of justice may well require a large corporation to await the outcome of litigation to obtain funds to which it claims entitlement, in the context of large-scale contracts under a Government program. *See Warner* v. *Cox,* 487 F.2d 1301 (5th Cir. 1974).

The lack of any urgent need for entry of a final judgment is underlined by the staleness of the claims upon which Curtiss-Wright's Complaint is based. The Complaint rests primarily upon allegations that Curtiss-Wright relied upon false representations by General Electric and the Navy in entering into the Naval Nuclear Program in 1968, and expanding its role in that Program substantially in late 1968 and early 1969. Whether this action filed on April 30, 1976 is wholly or partly time barred, a matter not yet adjudicated below,[5] Curtiss-Wright's allowing $60,000,000 claims to languish for several years after they could have been brought undermines its present crocodile protestations that it is an "obvious injustice" to delay entry of a final judgment as to individual claims in this litigation. As the Navy observed in calling for enforcement of the contractual clause requiring release as a condition precedent to final payment, if any "hardship" falls upon Curtiss-Wright through a delay in final payment, it stems from its own choice to defer raising

[5] General Electric has raised the defenses of statute of limitations and laches to Curtiss-Wright's legal and equitable claims (A. 58). These defenses have not yet been adjudicated.

and getting resolved the claims before final payment ordinarily would be due (A. 152). Rule 54(b) was not adopted to excuse a large corporation from self-inflicted problems—much less ones falling far short of any legally cognizable "hardship."[6]

To the extent that Petitioner pays lip service to the law by some contention that it has a "hardship" case, it relies ultimately upon two facts: The sum involved is to be considered substantial; and the statutory rate of interest is below current market interest rates. Neither distinguishes this case from the run-of-the-mill money judgment case. Neither is a persuasive or even proper consideration.

B. That A Substantial Amount Of Money Is Involved Is An Impermissible Basis For Rule 54(b) Certification.

First of all, justice and judgments should not turn on the amount of money involved; the law does not bend a more favorable eye to a wealthy corporation than a needy individual. The Curtiss-Wright litmus test of dollar amount could not be applied fairly, only arbitrarily. An amount that one District Judge may regard as requiring certification may not be so regarded by another Judge. If such an approach were sustainable under Rule 54(b) at all, the presumption that the failure to award immediate payment constitutes *per se* hardship properly could not be applied evenly to all parties before the Court, as the denial of $1,000 for even a brief time may confer a significant hardship upon an individual, but little or none

[6] *Cf. Schaefer* v. *First Nat'l Bank of Lincolnwood,* 465 F.2d 234, 235-36 (7th Cir. 1972) (delay in seeking Rule 54(b) certification undermines claim that there is "no just reason for delay" in entry of final judgment).

upon a substantial corporate litigant. The propriety of a Rule 54(b) certification should not turn on whether a litigant can persuade the District Court to regard the sum involved as sufficiently large to invoke the Rule.

The deferral of final judgment and the appeal in this case would not disadvantage Curtiss-Wright relative to thousands of other litigants, individual and corporate, with monetary claims, whose inability to enforce a judgment and to obtain current interest rates may have proportionately far greater effect upon them than it does upon Curtiss-Wright. Even a temporary loss of income for an individual pending legal proceedings does not usually constitute irreparable injury. *Sampson* v. *Murray,* 415 U.S. 61, 89-92 and n. 68 (1974). An individual earning $30,000 a year with a $1,900 claim, or a $300,000-a-year corporation with a $19,000 claim, could assert "infrequent harsh case" as readily as Curtiss-Wright, a $300,000,000 corporation with a $19,000,000 claim. To accept Curtiss-Wright's position would enable it to push to the head of the line of appellate cases, not because it is suffering from harsher circumstances than other claimants, but solely because it has a claim for a larger sum. That a 54(b) certification should turn on that factor is not just.

It is not for the Courts to establish a rule that determines the time for a final judgment and appeal according to the numbers of dollars involved. "The formulation of an appealability rule that turns on the amount of the plaintiff's claim is plainly a legislative, not a judicial, function." *Coopers & Lybrand* v. *Livesay, supra,* 437 U.S. at 472. This was an improper and inadequate basis for the District Court's certification, which rightly did not survive Court of Appeals review.

C. Providing A Higher Interest Rate Than That Prescribed By The State Legislature Is Likewise An Impermissible Basis For Rule 54(b) Certification.

The running of interest upon a judgment at a statutory rate rather than current market rates is likewise an unacceptable reason for entering Rule 54(b) final judgments. Allowing the entry of judgment upon that basis invades the legislative province; and it also reflects an improper disregard of the State substantive law governing in this diversity case. New York law provides that six percent shall be the rate of prejudgment as well as postjudgment interest.[7] That is New York State's resolution of the competing policies as to what rate is just and sufficient. No doubt the New York Legislature and Governor were fully aware that a higher rate of return might be available at various times outside of the litigation arena. That legislative judgment should not be set aside by a Federal District Judge whenever he believes the application of the New York law in a particular case is unfair.

With respect to "providing for interest upon judgments, whether there shall be a definite rule is a matter within the legislative discretion." *Funkhouser* v. *J. B. Preston Co.,* 290 U.S. 163, 169 (1933); *accord, Morley* v. *Lake Shore & M.S. Ry. Co.,* 146 U.S. 162 (1892); *Jamaica Savings Bank* v. *Toomey,* 77 Misc. 2d 887, 355 N.Y.S.2d 268, 270 (Sup. Ct.), *aff'd without opinion,* 46 A.D.2d 847, 363 N.Y.S.2d 313 (1974) (sustaining as within province of legislature, consti-

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[7] N. Y. Civ. Prac. Law, § 5004 (McKinney 1964-1979 Supp.). The District Court ruled that, in light of a contractual clause making applicable New York law (A. 181), that law would govern questions of interest. That ruling, not contested by Curtiss-Wright on appeal, accords with Restatement (Second) of Conflict of Laws §§ 187, 207 (1971). *See* Comments a. and e. to § 207.

tutionality of New York's change in statute, reducing interest rate on judgments from "legal rate" to six percent).

That recovery of interest at rates other than current market rates is a legislative matter, and may not properly be considered an "infrequent harsh case," is illustrated also by the variety of ways in which Congress has treated interest, in many statutes providing for either no or quite limited interest entitlement. On most claims against the Government, no prejudgment interest is awardable and interest runs at a rate of four percent. 28 U.S.C. §§ 2411, 2516, and 2674. Under the Suits in Admiralty Act, interest runs at four percent, and is simple. *See* 46 U.S.C. § 743; *United States* v. *Isthmian S.S. Co.*, 359 U.S. 314, 324-25 (1959). Under the Public Vessels Act, 46 U.S.C. § 782, prejudgment interest is explicitly denied "unless upon a contract expressly stipulating for the payment of interest." *See also* 25 U.S.C. § 656 (judgments to credit of Indians of California draw four percent interest); 31 U.S.C. § 505 (Government may recover only six percent interest against persons accountable for public money who fail to pay it into Treasury). In general, state law governs the running of interest in cases in Federal Courts (*e.g.*, 28 U.S.C. § 1961; Supreme Court Rule 56(1); F.R.App.P. 37); a host of state statutes and court or common law rules limit interest awards. It is commonplace for the rate of interest to be fixed by rule or statute, which may or may not reflect current market rates, as it does not in New York on this kind of claim.[8] From time to time, the state legisla-

[8] *See, e.g.*, Fla.Stat.Ann., § 55.03, (6% or 8%, depending upon Court in which judgment rendered); Idaho Code § 28-22-104 (8%); Ill.Ann.Stat. (1979 Cum.Supp.) ch. 74 § 3 (8%, or 6% for Government debtors); Iowa Code Ann. (1979 Cum.Supp.) § 535.3 (7%); Kan.Stat. Ann. (1974) § 16-204 (8%); Miss. Code (1972 Ann.) § 75-17-7 (8% or rate specified in contract); Mo.Rev.Stat. (1978) § 408.040 (6%); Mont.Rev.Codes Ann. (1947) § 47-128 (6%); Nev. Rev.Stat. (1973) § 17-130(2) (7%); N.H.Rev.Stat.Ann. (1978) § 336:1 (6%); Okla.Stat. (1971) tit. 12 § 727 (10%; 6% in personal injury cases); S.C.Code (1976) § 34-31-20 (6%); Va. Code (1950, 1979 Rep. Vol.) § 6.1-330.9 (6%); Wyo.Stat.Ann. (1977 Rep. Issue) § 1-16-102 (10%).

tures review the statutory rates of interest and revise them to reflect current circumstances, if they conclude that to be in the public interest.[9] Often no prejudgment interest is available upon unliquidated claims. *See e.g., Christiansen* v. *Farmers Ins. Exchange,* 540 F.2d 472, 478 (10th Cir. 1976) (Idaho and Utah Law); *Burran* v. *Dambold,* 422 F.2d 133, 136 (10th Cir. 1970) (New Mexico law); *Omaha Paper Stock Co.* v. *Harbor Ins. Co.,* 596 F.2d 283, 292 (8th Cir. 1979) (Nebraska law); *Mann and Parker Lumber Co.* v. *Wel-Dri,* 579 F.2d 973, 980 (6th Cir. 1978) (Tennessee law).

If any relief is to be afforded to holders of judgments in Federal Courts with respect to interest rates, it must be by the Congress. In fact, a Bill is now pending in Congress on that very subject. Senate Bill No. 1477, 96th Congress, 1st Session, the Federal Courts Improvement Act of 1979, passed the Senate on October 30, 1979; it is pending in the House of Representatives. Section 211(a) of that Bill would amend 28 U.S.C. § 1961 to provide that interest on judgments be allowed "at the rate established pursuant to section

[9] For example, Idaho, Illinois and Mississippi all recently increased the rates from six percent to eight percent. Iowa raised its statutory rate from five percent to seven percent in 1973. *See* Annotations to each of the Code Sections cited in footnote 8 above.

6621 of the Internal Revenue Code . . .," rather than "at the rate allowed by State law."[10] Section 211(b) would permit the discretionary award of prejudgment interest in certain circumstances.[11] Section 501 of the Bill provides that most of its provisions, including those relating to interest, "shall take effect two years after the date of enactment of this Act."

If inadequacy of statutory interest rates is a problem, emasculation of the finality rule would be a peculiarly clumsy and self-defeating solution. Not only would the toll upon orderly judicial administration be heavy, but many litigants whose turn in court was delayed would lose interest, particularly if their claims were unliquidated.

None of the foregoing was considered in *United Bank of Pueblo* v. *Hartford Accident & Indemnity Co.*, 529 F.2d 490 (10th Cir. 1976), relied upon by Petitioner (Pet. Br. 19, 31). While that case does refer to a loss of interest, without analysis and unsoundly in

[10] Section 6621 of Title 26, U.S.C., the Internal Revenue Code, provides for a basic interest rate of nine percent upon underpayments or overpayments of taxes, subject to adjustments, made not more frequently than every 23 months. Those adjustments peg the rate at the "adjusted prime rate charged by banks" during September of the year in which the adjustment is made, and become effective the following February. The term "adjusted prime rate charged by banks" is defined (26 U.S.C. § 6621(c)) as "90 percent of the average predominant prime rate quoted by commercial banks to large businesses, as determined by the Board of Governors of the Federal Reserve System."

[11] With respect to prejudgment interest, under present law in diversity cases the conflicts rule of the forum is followed. *Klaxon Co.* v. *Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941); *Quad Constr., Inc.* v. *Wm. A. Smith Contracting Co.*, 534 F.2d 1391, 1394-99 (10th Cir. 1976).

our view for reasons discussed above, it does not assert that factor as an independently decisive consideration, only as one of many factors supporting a Rule 54(b) certification under the particular facts of that case. While the Petitioner asserted a "conflict" between *United Bank of Pueblo* and the decision below, based solely upon the off-hand reference to interest in *United Bank of Pueblo* (Petition 9), that case is readily distinguishable: All claims between the two contending parties had been fully and finally adjudicated; the party in whose favor certification was granted did not face remaining counterclaims, so that there was no prospect of payment of substantial sums to it followed by a later obligation of repayment. What remained to be litigated was only an unrelated cross-claim, which could not affect the plaintiff's right to recovery, or the amount of its recovery. Further, the decision on the Rule 54(b) appeal was expected to facilitate, and possibly moot or render unnecessary, the trial of the third-party action. 529 F.2d at 492-493. Under those circumstances, deciding the appeal before all claims were adjudicated apparently served the interests of judicial economy. Certainly the case does not support the notion that a Federal Court in a diversity case may in effect modify the statutory interest rate established by a State.

Rule 54(b) provides no such license to invade this patently legislative domain. Curtiss-Wright is plainly in error in suggesting that the Rule conveys any such license and the District Court clearly erred in accepting the suggestion. The Court of Appeals was quite correct in setting aside the certification which so misconceived Rule 54(b) and the judicial function.

D. Rule 54(b) Could Not Properly Have Been Invoked Under These Circumstances.

Consequently, it is naught but *ipse dixit* to assert that "[i]f ever there were a case for which Rule 54(b) was intended it is the case before this Court" (Pet. Br. 33-34). In reality, the kinds of cases in which genuine harshness of non-finality has resulted in the entry of Rule 54(b) judgments contrast sharply with the present one. In *In re Uranium Antitrust Litigation,* 26 F.R. Serv. 2d 847, 853-54 (N.D.Ill. 1979), for example, a Rule 54(b) judgment was entered against defaulting defendants. The Court reasoned that all were foreign corporations, and there existed a significant danger that they might conceal or transfer assets while other claims were decided. In addition, the seriousness of the charges of the complaint against them and their willful avoidance of meeting those charges "require that they be held promptly accountable for their alleged actions." It could have been added that in a default case, there was little likelihood of a piecemeal appeal, or any appeal. *See also Ferguson* v. *Bartels Brewing Co.,* 26 F.R.D. 612 (S.D.N.Y. 1960) (Rule 54(b) judgment entered against company whose president willfully failed to appear for deposition, and who was withdrawing assets from the company to the derogation of creditors), *appeal dismissed,* 284 F.2d 855 (2d Cir. 1960).[12] Similarly, the potentiality of death of witnesses, loss or destruction of records or diminished recollection has been held to

[12] The appeal was dismissed in *Ferguson*, notwithstanding the hardship, on the ground that Rule 54(b) did not apply to adjudications against but one party. Shortly thereafter, in 1961, Rule 54(b) was amended to permit certifications, if otherwise proper, in multi-party cases.

justify such an entry. *Grimm* v. *Whitney-Fidalgo Seafoods, Inc.,* 61 F.R.D. 310 (S.D.N.Y. 1974).

That such exceptional circumstances are required to invoke Rule 54(b) is suggested also by the citation in the Advisory Committee's Note to the 1961 revision to the concurring opinion of Judge Frank in *Pabellon* v. *Grace Line,* 191 F.2d 169, 179 (2d Cir.), *cert. denied,* 342 U.S. 893 (1951), as illustrating that "The danger of hardship through delay of appeal until the whole action is concluded may be at least as serious in the multi-parties situations as in multiple-claims cases." That opinion had noted as a "serious injustice" the following example:

> "In a suit with several defendants charged jointly, the trial court, previous to trial, erroneously orders and dismisses the one solvent defendant. Being unable to appeal from that order, plaintiff must go through a long, expensive trial, lasting several months, in which he obtains a judgment that is worthless practically, before he can procure a reversal of the order dismissing the solvent defendant, and thus be able to try and to prove his case against that defendant." 191 F.2d at 179.

As similarly indicated in *Allis-Chalmers, supra,* 521 F.2d at 366, n. 14, the Rule aims mainly at situations "involving considerations of solvency, economic duress, etc." *See also Campbell* v. *Westmoreland Farm, Inc., supra,* 403 F.2d at 942 (certification improper where an appeal would not eliminate unnecessary evidence or shorten the trial, "[n]or is this a situation where plaintiffs' recovery would be jeopardized or prejudiced if they had to await trial" of a claim not yet adjudicated).

The other considerations cited by the District Court as supporting certification here do not bear upon whether this is an "infrequent harsh case." They recite only compliance with technical requirements of Rule 54(b), such as the severability of the claim, or the absence of factors which would further weigh against certification, *i.e.*, that "certification should not prevent the rest of the case from being prepared for trial" (A. 197). As to the first, compliance with "technical requirements of the Rule" is "not sufficient." *Brunswick Corp.* v. *Sheridan, supra,* 582 F.2d at 182-83. Although it is literally true that certification does not "prevent" the case from being prepared, neither does it here aid in such preparation. "Rule 54(b) orders usually have the unfortunate effect of delaying the main action . . . ." *Schwartz* v. *Compagnie General Transatlantique,* 405 F.2d 270, 274 (2d Cir. 1968). *See also Northway, Inc.* v. *TSC Industries, Inc.,* 361 F.Supp. 108, 117 (N.D.Ill. 1973) ("[a]n appeal . . . would only serve to delay the trial of the claims against the corporate defendants, by diverting plaintiff's attorneys' energies"), *aff'd in part, rev'd in part on other grounds,* 512 F.2d 324 (7th Cir. 1975), *judgment rev'd on other grounds,* 426 U.S. 438 (1976).

The other considerations relied upon by the District Court, that it should prove unnecessary for the Court of Appeals to review the same issues twice and that the decided claims are likely not be mooted by future developments, are neutral or irrelevant to determining whether deployment of Rule 54(b) is justified. As in *Panichella* v. *Pennsylvania Railroad Co., supra,* 252 F.2d at 455, the possibility that a question may be mooted by subsequent developments may militate against immediate Rule 54(b) certification, because the Court of Appeals might never have to decide the issue.

But if, as the District Court hypothesized,[13] the issue will not be mooted, it will have to be confronted at some time. Whether it should confront the issue while further proceedings in the District Court continue or rather at the termination of all the District Court proceedings is the very question posed in considering whether to enter a final judgment under Rule 54(b). A determination as to whether the claims will become moot, or whether an issue will have to be heard twice by the Court of Appeals, furnishes no answer or guidance directed to the question when appellate review should occur. Certainly neither consideration is relevant to the showing demanded by the availability of 54(b) only in the "infrequent harsh case."

The narrowness of the Rule 54(b) exception to the general finality rule is emphasized by decisions of this Court analogizing the showing required under the Rule to requiring a showing of irreparable damage if an interlocutory appeal were not permitted. In *DiBella* v. *United States,* 369 U.S. 121, 126 (1962) (per Frankfurter, J.), for example, Rule 54(b) was characterized as being of "like effect" to doctrines permitting immediate appeals where otherwise the right of appellate review could be frustrated and "the practical effect of the order will be irreparable by any subsequent appeal."[14] And in *Gardner* v. *Westinghouse Broad-*

[13] It indeed is highly speculative whether there will need to be an appeal on the release issue at the end of this complex commercial case.

[14] *Compare Abney* v. *United States,* 431 U.S. 651 (1977) (denial of motion to dismiss on double jeopardy grounds appealable, for rights conferred by double jeopardy clause otherwise could be substantially impaired); *with United States* v. *McDonald,* 435 U.S. 850 (1978) (no piecemeal appeals from denial of motion to dismiss for speedy trial denial).

casting Co., 437 U.S. 478 (1978), the statutory provision (28 U.S.C. § 1292(a)(1)) permitting appeals from orders granting or denying interlocutory injunctions was characterized as a "narrow" exception to the finality rule, "keyed to the 'need to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequences'" (quoting *Baltimore Contractors* v. *Bodinger*, 348 U.S. 176, 181 (1955)). Rule 54(b) is aimed at comparable injustice, and it, too, is a "narrow" exception to the finality rule. The particular consequences of which Curtiss-Wright is complaining and the considerations which the District Court recited simply do not meet the test imposed by the law. The plain truth is that Curtiss-Wright did not make the showing required to qualify this as an "infrequent harsh case" permitting Rule 54(b) certification.

III. THE EXISTENCE OF SUBSTANTIAL COUNTERCLAIMS IS A FACTOR PROPERLY CONSIDERED AS WEIGHING AGAINST THE ENTRY OF FINAL JUDGMENTS UNDER RULE 54(b).

A. The Third Circuit Position Is That The Existence Of Counterclaims Is One Factor Which May Properly Be Weighed; A *Per Se* Rule Is A Straw Man Of Petitioner's Weaving.

The simplistic approach of Curtiss-Wright wrenches out of context and misstates the Third Circuit's views as to the relationship of counterclaims to applications for entry of Rule 54(b) judgments. Indeed, in posing the question presented as whether the existence of counterclaims *per se* precludes the issuance of a Rule 54(b) certification (*e.g.*, Pet. Br. 2, 20), Curtiss-Wright addresses an issue nowhere presented. The Third Circuit's position with respect to the effect of the pendency of substantial counterclaims upon the

consideration of applications for entry of a final judgment under Rule 54(b), as explicated in *Allis-Chalmers Corp.* v. *Philadelphia Electric Co.*, 521 F.2d 360 (3d Cir. 1975), upon which that Court relied in this case (A. 197), is not that such counterclaims *per se* bar certification, but rather that "[*i*]*n the absence of unusual or harsh circumstances,* we believe that the presence of a counterclaim, which could result in a set-off against any amounts due and owing to the plaintiff, weighs heavily against the grant of 54(b) certification" (*id.* at 366). The Third Circuit characterized the existence of a counterclaim as "one factor" bearing upon the Rule 54(b) application. *Id. See also TPO Incorporated* v. *FDIC*, 487 F.2d 131, 134 (3d Cir. 1973) ("We see no special circumstances in the record which would favor the entry of judgment in favor of TPO at this time when it is possible that subsequent litigation may require a return of the sum awarded and perhaps additional moneys.") In none of its leading cases—*Allis-Chalmers, TPO,* or the present one—has the Third Circuit held that if "special circumstances" or genuine hardship were shown, those considerations could not override the natural reluctance to enter final judgment under Rule 54(b) when counterclaims remained pending.[15] In short, the Third

[15] Under New York law "it is improper to award summary judgment . . . while there exists a meritorious counterclaim for an amount equal to or greater than that demanded in the complaint." *Illinois McGraw Elec. Co.* v. *John J. Walters, Inc.*, 7 N.Y.2d 874, 196 N.Y.S.2d 1003, 164 N.E.2d 872 (1959); *Scolite Internat'l. Corp.* v. *Vincent J. Smith, Inc.*, 68 A.D.2d 417, 419, 418 N.Y.S.2d 191, 193 (1979). Although we do not urge that New York summary judgment practice applies in a federal diversity suit, *see Schroeter* v. *Ralph Wilson Plastics, Inc.*, 49 F.R.D. 323, 326 (S.D.N.Y. 1969), the fact that the claim evidently would not even yet be adjudicated in a State Court further diminishes any argument that there is here a legally cognizable "harshness."

Circuit is on target, while Curtiss-Wright is off target altogether; the issue in the case is whether Curtiss-Wright has met its burden affirmatively to show that this is an "infrequent harsh case."

In appraising the presence of counterclaims as a factor to be considered with regard to 54(b), and as one tending strongly against certification, the Third Circuit is in accord with other authority. *See, e.g., Gaetano Marzotto & Figli, S.P.A.* v. *G.A. Vedovi & Co.*, 28 F.R.D. 320 (S.D.N.Y. 1961); *Schroeter* v. *Ralph Wilson Plastics, Inc.*, 49 F.R.D. 323, 326 (S.D. N.Y. 1969); 6 *Moore's Federal Practice* ¶ 54.35[1] at 585 (2d ed. 1976) ("The district court's discretion in entering a 54(b) certificate where a counterclaim is involved should be exercised with special care"); 3 *Moore's Federal Practice* ¶ 13.17 at 432 (2d ed. 1979); 10 Wright & Miller, *Federal Practice and Procedure, Civil* § 2659 at 82 (1973) (it is undesirable to require one party to pay over to the other substantial sums "only to be reimbursed if it prevails on its as yet unadjudicated counterclaim"); 3 Barron & Holtzoff, *Federal Practice & Procedure* § 1241. *Cf., Bethlehem Steel Corp.* v. *Tishman Realty & Const. Co.*, 72 F.R.D. 33, 39-40 (S.D.N.Y. 1976).

B. There Is No Support For The Curtiss-Wright Position That The Existence Of Counterclaims May Not Properly Be Considered.

The contrary arguments of Curtiss-Wright are based upon a superficial, untenable reading of the history of Rule 54(b), and of the ruling of this Court in *Cold Metal Process Co.* v. *United Engineering & Foundry Co.*, 351 U.S. 445 (1956). With respect to history, Curtiss-Wright's contention is essentially that because the 1946 amendment of Rule 54(b) elimi-

nated previously existing language barring certifications in any case in which a compulsory counterclaim remained pending,[16] thereafter the existence of such a counterclaim was no factor in determining whether to certify. The argument is a *non sequitur;* its conclusion fails to follow from its premise.

> "Under Rule 54(b), as originally promulgated, the court could not enter a separate judgment upon a claim that was final for purposes of appeal prior to the disposition of a compulsory counterclaim . . . . By virtue of the recasting of Rule 54(b) in 1946, however, the court may now direct the entry of a separate final judgment on the claim or counterclaim upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. . . . Although the amended Rule gives the power, *it will probably be a rare case in which the court will find it advisable to enter a final appealable judgment on a claim or compulsory counterclaim prior to judgment on the other side of the case,* since one of the main objectives of Rule 13(a) is to treat as a unit a claim and a counterclaim which arises out of the transaction or occurrence made the basis of the original claim, and since *one purpose of the amendment of Rule 54(b) was to lessen the likelihood of piecemeal disposition of an action.*" 3 *Moore's Federal Practice* ¶ 13.17 at 13-431 to 13-432 (2d ed. 1979).

So far as concerns the volume of cases to be eligible for 54(b) certification, the intention in the 1946 amendment was "to restrict appeals in litigation involving multiple claims," 6 *Moore's Federal Practice* ¶ 54.27 [2-2] at 325 (2d ed. 1976); as noted above, "to *lessen* the likelihood of piecemeal disposition of an action."

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[16] *See* 6 *Moore's Federal Practice* ¶ 54.01[3] (2d ed. 1976).

Plainly, before 1946, no final judgment could have been entered when a compulsory counterclaim remained unadjudicated. The 1946 amendment was quite limited. It was to retain the integrity of the general finality rule but to avoid confusion in several areas—including the drawing of fine lines between permissive and compulsory counterclaims which occasioned repeated appeals as a protective matter.

There is no hint in the Advisory Committee Notes that bringing certainty to this area would countenance free-wheeling certification of appeals under Rule 54 (b) irrespective of the existence of substantial counterclaims. Certainly the amendment was not meant to permit certification in every money judgment case in which the market interest rate exceeds the statutory rate—hardly an "infrequent" occurrence—despite the pendency of pertinent counterclaims and absent a showing of special circumstances. The "infrequent harsh case" proviso shows that the Advisory Committee and the Rule were looking in the opposite direction.

Cold Metal Process, supra, harbors no more support for Petitioner than the 1946 amendment. In that case, and the companion case, *Sears, Roebuck and Co.* v. *Mackey,* 351 U.S. 427 (1956), the Rule 54(b) exception to the entrenched principle that appeals should be taken only after all claims are disposed of was attacked as exceeding the bounds of the statutory finality rule incorporated in 28 U.S.C. § 1291. This Court repelled that attack, holding that "[t]he amended rule preserves the historic federal policy against piecemeal appeals in many cases more effectively than did the original rule." *Sears, Roebuck, supra,* 351 U.S. at 438. *Sears, Roebuck* and *Cold Metal Process* were not directed at the nature and quality of the showing required for a

Rule 54(b) certification; the Court merely noted that the District Courts had discretion to act in the first instance, and that "[w]ith equally good reason, any abuse of that discretion remains reviewable by the Court of Appeals." *Sears, Roebuck, supra,* 351 U.S. at 437.

Far from suggesting that merely because some claims could not be certificated despite the presence of counterclaims, it was always a permissible exercise of discretion to do so, *Cold Metal Process* implied the contrary: "under the amended rule, the relationship of the adjudicated claims to the unadjudicated claims is one of the factors which the District Court can consider in the exercise of its discretion. If the District Court certifies a final order on a claim which arises out of the same transaction and occurrence as pending claims, *and the Court of Appeals is satisfied that there has been no abuse of discretion,* the order is appealable." 351 U.S. at 452.

The facts as to the adjudicated claims and the remaining counterclaim in *Cold Metal Process* are so completely different from those in the present case, indeed unique, as to render untenable Curtiss-Wright's argument that certification here is not an abuse of discretion merely because certification was permissible in *Cold Metal Process.* As the opinions of this Court and the Third Circuit (190 F.2d 217, 221) in *Cold Metal Process* indicate, the counterclaim was purely ancillary to the main action in which an appeal was taken from a master's report. Indeed, the parties agreed that final action upon the master's report should precede any trial on the counterclaim; and that such action might even make it undesirable to try the counterclaim. 351 U.S. at 450, n. 5. Apparently the counterclaim pri-

marily sought additional relief which might be appropriate in the eventuality that the master's report would be sustained on appeal and certain additional facts could be proved. *See* 190 F.2d at 220-21. Where an immediate appeal on adjudicated claims may obviate the need for further proceedings in the District Court, a certification may serve the interests of judicial economy. *See also Gas-A-Car, Inc.* v. *American Petrofina, Inc., supra,* 484 F.2d at 1105; *Campbell* v. *Westmoreland Farm, Inc., supra,* 403 F.2d at 942; *Purdy Mobile Homes* v. *Champion Home Builders, supra,* 594 F.2d at 1316-1317.

No similar factors support Curtiss-Wright's attempt to invoke Rule 54(b). In this case, the Counterclaims are not ancillary but compulsory; they arise from the identical contracts as do Curtiss-Wright's claims.[17] The Counterclaims are substantial and have been sustained

[17] *See, e.g., Parmalee* v. *Chicago Eye Shield Co.,* 157 F.2d 582 (8th Cir. 1946); 3 *Moore's Federal Practice* ¶ 13.13 (2d ed. 1979). Should the Court consider Curtiss-Wright's demeaning of General Electric's Counterclaims as "weak" (Pet. Br. 24), or merely "facially" valid but factually unsustainable, as relevant or proper, a brief discussion of the claims and counterclaims in this action seems in order. The principal claims of Curtiss-Wright are that it was "guaranteed" a profit under *fixed-price* contracts, or that it relied upon alleged representations of General Electric that it "would" make a profit in an endeavor expected to extend over many years and necessarily involving a multitude of factors affecting profitability. From General Electric's perspective, such contentions are utterly alien to these commercial contracts and relationships between two well-established large corporations each of which is well able to take care of itself; the Curtiss-Wright claims lack any basis in fact or merit in law; they have not yet been tested upon a motion to dismiss or for summary judgment.

Contrastingly, the Counterclaims have withstood a motion to dismiss. The legal bases for General Electric's Counterclaims which seek recovery of benefits General Electric conferred upon

as against a motion of Curtiss-Wright to dismiss. The adjudication by the Third Circuit of the sharply contested issue concerning final payments[18] would not aid in the District Courts disposition of any other issues. It would require the Third Circuit to delve in some degree into the relationship of the parties and some of the circumstances underlying their broad-ranging dispute; Curtiss-Wright's attempt to appeal indeed would irrevocably involve the Third Circuit in a classic "piecemeal" appeal.

Curtiss-Wright are set forth at pages 10-45 in the Brief General Electric filed in the District Court on May 31, 1977, in opposition to Curtiss-Wright's motions for summary judgment regarding the release issue, and to dismiss the Counterclaims, which is part of the record on file with the Clerk of this Court. In its footnote (Pet. Br. 24 n. 23) attempting to cast doubt upon the merits of General Electric's Counterclaims, Curtiss-Wright relies upon materials, General Electric's Responses to Interrogatories, which Curtiss-Wright did not rely on before the District Court or before the Court of Appeals until rehearing. If this Court is to be importuned to make judgments about the merits of General Electric's Counterclaims based upon such matters, General Electric would point to Supplemental Responses it has recently filed to Curtiss-Wright's Interrogatories, specifying hundreds of instances of unworkmanlike and incompetent performance by Curtiss-Wright, and of assistance rendered by General Electric.

[18] To say the least, there is grave doubt as to the correctness of a decision holding that a large commercial party is entitled to maintain a $60,000,000 lawsuit and yet receive a final payment even though it agreed "as a condition precedent to final payment" that the other party to the contract, and the Government, be released from all liabilities and claims arising under or by virtue of the contract. General Electric considers the District Court's ruling on the merits to be entirely incorrect. Many New York cases strictly enforce "condition precedent" clauses in similar circumstances. *E.g., Coulter* v. *Board of Education,* 63 N.Y. 365, 368-369 (1875); *R. J. Marshall, Inc.* v. *Turner Construction Co.,* 139 N.Y.S.2d 55, 58 (Sup. Ct. 1955); *Witherell* v. *Lasky,* 286

C. There Is No Support For The Curtiss-Wright Position That Considerations Which May Be Taken Into Account Under Rule 62(h) Are *Ipso Facto* Barred From Consideration Under Rule 54(b).

The argument by Curtiss-Wright that the Third Circuit's approach "ignores the interrelationship between Rules 54(b) and 62(h)" (Pet. Br. 25-29) is specious and itself misunderstands that relationship. In essence, Curtiss-Wright contends that because the District Court may consider hardships to the parties in deciding under Rule 62(h) whether to stay Rule 54(b) judgments, perforce it may not consider harshness in deciding whether to enter the Rule 54(b) judgment itself. Logic and realism are wanting in this contention.

The history of Rule 62(h) is itself dispositive. That Rule was a product of the 1946 amendments and embodies a revision of language which previously had appeared in Rule 54(b) itself. Obviously, the Advisory Committee which stressed that Rule 54(b) as amended in 1946 extended permissible certification only to the "infrequent harsh case" never removed that test from Rule 54(b), least of all by transferring language dealing with stays, and not certifications, to Rule 62(h).

A primary reason why Rule 54(b) judgments are to be entered only in the "infrequent harsh case" is one which is not addressed at all by a Court in the context of deciding under Rule 62(h) merely whether a judgment should be stayed pending a Rule 54(b) appeal from the resolution of part of a case: the preservation

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App.Div. 533, 535, 145 N.Y.S.2d 624, 626 (1955). *See also Brandt Corp.* v. *City of New York*, 14 N.Y.2d 217, 219-220, 250 N.Y.S.2d 407, 409, 199 N.E.2d 493, 494-495 (1964). The single case relied upon by the District Court as supporting a contrary result simply did not involve a "condition precedent" clause at all.

of the integrity of the finality rule. The 1946 Advisory Committee Note explicitly states that such is the function of the "infrequent harsh case" limitation. *See* 5 F.R.D. at 473; *Brunswick Corp.* v. *Sheridan, supra,* 582 F.2d at 183.

Obviously, legal concepts and criteria are not ticketed and useable for one Federal Rule of Civil Procedure, and one Rule only. To take but one example, "irreparable damage" is a central consideration under Rule 65 with respect to injunctive orders and under Rule 62 with respect to consideration of whether to stay such orders; that concept may be considered akin to the Rule 54(b) "infrequent harsh case" requirement. *See* pp. 31-32, *supra.* Curtiss-Wright can hardly be more successful in its backdoor Rule 62(h) attack upon that requirement embedded in Rule 54(b) than in its direct attacks disposed of earlier in this Brief.

The decision upon a motion to certify under Rule 54(b) implicates the interests "of sound judicial administration and public policy." *Allis-Chalmers Corp.* v. *Philadelphia Elec. Co., supra,* 521 F.2d at 365; *Arlinghaus* v. *Ritenour,* 543 F.2d 461, 464 (2d Cir. 1976). In the context of passing upon motions for Rule 54(b) certifications the Court decides whether an early appeal is necessary; in the context of passing upon stays under Rule 62(h) where such an appeal is appropriate, the Court deals with a much narrower question of the status of the judgment during the limited period of the 54(b) appeal.

The usual function of the District Court in passing under Rule 62(h) is to insure that the party in whose favor the judgment runs does not lose the security

for the judgment while the appeal is pending;[19] by its very terms Rule 62(h) speaks of the court's prescribing conditions "as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered." *See also Robbins Flooring, Inc.* v. *Federal Floors, Inc.*, 445 F.Supp. 4, 13-14 (E.D. Pa. 1977) (stay denied where defendant in financial difficulties offered no acceptable plan for ultimate satisfaction of judgment).

It is vacuous to suggest that merely because harshness, or the lack of it, is weighed in the narrower context of Rule 62(h), it cannot be also considered when the Court decides the broader matter of whether an appeal should be allowed. Curtiss-Wright's approach would make a shambles of the Federal policy against piecemeal appeals. It would be little solace to Courts of Appeals inundated with Rule 54(b) appeals, or litigants waiting their turn while such appeals are decided, that the District Courts had acted with care and weighed the hardships in deciding whether the judgment should be stayed pending that unnecessary appeal.

A nuance of Curtiss-Wright's argument on this point, and identically a *non sequitur*, is the suggestion (Pet. Br. 27-28) that because a Court undoubtedly may consider the pendency of a counterclaim as the reason to enter a stay under Rule 62(h), *e.g., Tire Sales Corp.* v. *Cities Services Oil Corp.*, 410 F. Supp. 1222,

[19] If a 54(b) certification is improper, or there otherwise is no proper final judgment entered, there of course may be no execution upon a grant of summary judgment under Rule 56, even without a stay. *See Internat'l Controls Corp.* v. *Vesco*, 535 F.2d 742, 744 (2d Cir. 1976), *cert. denied*, 434 U.S. 1014 (1978); *Redding & Co.* v. *Russwine Construction Corp.*, 135 U.S.App.D.C. 153, 159, 417 F.2d 721, 727 (D.C. Cir. 1969).

1232 (N.D. Ill. 1976), that consideration must be banished in deciding whether a Rule 54(b) judgment should be entered.[20] Quite the contrary is most reasonable: In fact, Courts should and do recognize the general inadvisability of forcing a party to pay out monies at an interlocutory stage only to recoup them later in the suit, an inadvisability which, in the absence of a showing of genuine hardship, militates both against 54(b) entry of a final monetary judgment and in favor of stays of any judgments. *See, e.g., Allis-Chalmers, supra,* 521 F.2d at 366; 10 Wright & Miller, *Federal Practice and Procedure: Civil* § 2659 (1973). Reason and realism commend recognition of the pendency of counterclaims as a strong factor militating against 54 (b) certification.

IV. THE COURTS OF APPEALS HAVE THE AUTHORITY AND DUTY TO REVIEW FOR ABUSE OF DISCRETION RULE 54(b) CERTIFICATIONS AND THAT AUTHORITY WAS EXERCISED PROPERLY HERE.

That the Courts of Appeals properly review for abuse of discretion District Court certifications and entries of final judgments under Rule 54(b) is settled beyond serious dispute. In recognizing the initial discretion in the District Courts, this Court in *Sears, Roebuck and Co.* v. *Mackey, supra,* added that "[w]ith equally good reason, any abuse of that discretion remains reviewable by the Court of Appeals." 351 U.S. at 437. The principal reason why such review is fitting, and one to which the Courts of Appeals are particularly

[20] Curtiss-Wright argues for this proposition on the basis of cases which hold that the pendency of a counterclaim or set-off is ground for entry of a stay under Rule 62(h). The cases do not hold that such is not a proper matter to be considered under Rule 54(b); that embellishment is solely Curtiss-Wright's.

sensitive, is the preservation of the Federal finality rule and its policy against piecemeal appeals. Since *Sears, Roebuck* and *Cold Metal Process* the Courts of Appeals have fully recognized their duties to scrutinize Rule 54(b) certifications carefully rather than blindly acquiescing in them. "[T]he required determination 'that there is no just reason for delay' ought not to be made as a matter of rote—even when, as here, there was no objection from the party who would be adversely affected or anyone else." *Arlinghaus* v. *Ritenour, supra,* 543 F.2d at 463.

The Courts of Appeals indeed have overturned Rule 54(b) certifications not only where formal requirements such as the full disposition of a severable "claim" have not been met,[21] but also when the grant of the certification was improvident because the situation did not present the "infrequent harsh case" in which the limited exception to the finality rule was justified,[22] or other reasons made the certification an abuse of discretion.[23]

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[21] *E.g., McIntyre* v. *First National Bank of Cincinnati,* 585 F.2d 190 (6th Cir. 1978); *McNellis* v. *Merchants Nat'l Bank & Trust Co.,* 385 F.2d 916 (2d Cir. 1967); *Cott Beverage Corp.* v. *Canada Dry Ginger Ale,* 243 F.2d 795 (2d Cir. 1957). *Cf. Liberty Mut. Ins. Co.* v. *Wetzel,* 424 U.S. 737, 743-744 (1976).

[22] *E.g., Campbell* v. *Westmoreland Farm, Inc., supra,* 403 F.2d at 942; *Panichella* v. *Pennsylvania R.R. Co., supra,* 252 F.2d at 455; *Columbia Broadcasting System* v. *Amana Refrigeration, supra,* 271 F.2d at 259 ("The instant case presents no hardship or unfairness which would justify discretionary departure from the normal rule as to the time of the appeal"); *Gass* v. *Nat'l Container Corp.,* 271 F.2d 231, 233 (7th Cir. 1959).

[23] *E.g., Robbin* v. *American University,* 117 U.S.App.D.C. 351, 330 F.2d 225 (1964) (immediate appeal could adversely affect party in District Court who had not been heard); *Zangardi* v. *Tobriner,* 117 U.S.App.D.C. 350, 330 F.2d 224 (1964) (where

The Third Circuit's dismissal of the appeal in the present case falls well within the appropriate function of the Courts of Appeals. The role of the Courts of Appeals is to prevent undue expansion of the limited exception from the finality rule conveyed by Rule 54(b). Courts of Appeals have the duty to safeguard their ability to carry out their statutory function to adjudicate appeals from final judgments as economically and expeditiously as possible.

One aspect of the appellate review function over Rule 54(b) certifications is to insure that the District Courts, as well as not adopting too lax an approach, apply principled standards which do not undermine the policy against piecemeal appeals. Here the District Court in finding "hardship" relied solely upon two factors—the size of the judgment, and the difference between statutory interest rates and current market rates—which are unacceptable on principle for the reasons set out above. The District Court also required no affirmative showing on the part of the applicant for the certification, and afforded inadequate consideration to the pendency of Counterclaims.

In review of Rule 54(b) certifications even more than in review in other areas of law in which a District Court has considerable discretion, the appellate court properly may scrutinize and reverse a determination based upon faulty standards or premises. *E.g., Delaware and Hudson Ry. Co.* v. *United Transportation Union,* 146 U.S.App.D.C. 142, 450 F.2d 603, 619, *cert.*

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two counts turn on same question, disposing of one and leaving other for future disposition "complicates the case and serves no useful purpose"); *Brunswick Corp.* v. *Sheridan, supra,* 582 F.2d at 183.

denied, 403 U.S. 911 (1971). The appellate courts have a special concern, expertise, and interest in maintaining the integrity of the finality rule.

The Courts of Appeals have the primary responsibility for reviewing Rule 54(b) certifications, in light of the particularized situation; their decisions should not be reversed unless they have misconceived the review function. *Cf. National Labor Relations Board* v. *Pittsburgh S.S. Co.,* 340 U.S. 498, 502-503 (1951); *Federal Trade Commission* v. *Standard Oil Co.,* 355 U.S. 396, 400-01 (1958); *Golden State Bottling Co.* v. *National Labor Relations Board,* 414 U.S. 168, 172 (1973); *South Prairie Construction Co.* v. *Local 627, International Union of Operating Engineers,* 425 U.S. 800, 803 n. 5 (1976). There was no such misconception here. The decision below should be affirmed.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals for the Third Circuit should be affirmed.[24]

Respectfully submitted,

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[24] In the conclusion of its Brief, at p. 34, Curtiss-Wright asks that the case be remanded to the Court of Appeals "with a direction to reinstate the orders of final judgments of the district court . . . ." This request for relief elides the fact that the Third Circuit has not passed upon the merits of General Electric's appeal. Should this Court reverse the Third Circuit on the Rule 54(b) issue, the case must of course be remanded for a decision upon the merits of the release issue.

Supreme Court, U.S.
JAN 7 1980
MICHAEL RODAK, JR., CLERK

FOR ARGUMENT

In The

Supreme Court of the United States

October Term, 1979

No. 79-105

CURTISS-WRIGHT CORPORATION,

Petitioner,

vs.

GENERAL ELECTRIC COMPANY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY BRIEF FOR PETITIONER

INTRODUCTION

In the Brief for Petitioner, Curtiss-Wright set forth its position as to the questions presented for review on which the petition for the writ of certiorari was granted. In the Brief for Respondent, GE often makes arguments which are of little, if any, relevance to the questions presented, and when it does discuss these questions, GE misstates Curtiss-Wright's position on key points. Curtiss-Wright submits this Reply Brief to assist the Court in placing GE's arguments in proper perspective.

POINT I

THE ISSUES BEFORE THE COURT RELATE TO THE BARRIER WHICH THE THIRD CIRCUIT HAS ERECTED TO RULE 54(b) CERTIFICATION IN THE PRESENCE OF A COUNTERCLAIM, AND THE COURT SHOULD NOT BE DIVERTED BY THE EXTRANEOUS ISSUES SOUGHT TO BE RAISED BY GE.

In the Brief for Petitioner (hereinafter "CW Brief"), Curtiss-Wright focused on the key issue before this Court, namely, whether the mere possibility of a setoff raised by GE's unadjudicated and unliquidated counterclaim deprived the district court of discretion to enter final judgments on Curtiss-Wright's adjudicated and liquidated claims for final payment, totaling nearly $19 million, for goods sold and delivered when those claims were factually and legally unrelated to the counterclaim and the balance of the claims in the complaint. GE's responding brief (hereinafter "GE Brief") is, for the most part, an attempt to distract this Court from that issue although it is indeed the issue upon which the Third Circuit's decision turns.

GE never acknowledges that the possibility of a setoff posed by the counterclaim was the true basis upon which the Third Circuit concluded that the district court had abused its discretion and that it was this mere possibility that triggered the Third Circuit's establishment of its confused and prohibitive standard of "unusual or harsh circumstances." In fact, GE misstates the holding of the court of appeals when it asserts that the appellate court found two independent grounds for its decision, *i.e.*, (1) the absence of "unusual or harsh circumstances" such as ones "involving solvency, economic duress, etc." and (2) the pending counterclaims (GE Brief at 7-8). In fact, the Third Circuit held that a showing of "unusual or harsh circumstances" was required *because* of the pending counterclaim. There is nothing in the opinion below indicating

that the Third Circuit would require a showing of "unusual or harsh circumstances," as it attempted to define that term, in the absence of the counterclaim.[1]

In fact, only one day after the filing of its opinion in this case, the Third Circuit unanimously affirmed a Rule 54(b) certification of a money judgment when no counterclaim was pending. *See Tilden Financial Corp. v. Palo Tire Serv., Inc.*, 596 F.2d 604 (3rd Cir. 1979). Nowhere in *Tilden* did the court mention "unusual or harsh circumstances" nor can any be ascertained from a reading of the opinion. It is more than of some interest to note that Judge Garth, who wrote the majority opinion in *Allis-Chalmers Corp. v. Philadelphia Electric Company*, 521 F.2d 360 (3rd Cir. 1975), participated in the *Tilden* decision. Interestingly, both Judge Garth and Judge Hunter, who also participated in *Tilden*, did not participate in Curtiss-Wright's petition for rehearing in the present case.

Instead of addressing the counterclaim issue, GE launches into a virtually irrelevant discussion of the policy against piecemeal appeals. *See* Point III, *infra*, at 15-18. Not content with raising this smoke screen, GE improperly argues (1) the merits of the "release issue," (GE Brief at 39 n.18), decided by the district court in Curtiss-Wright's favor, an issue which the Third Circuit did not address and which is not before this Court, and (2) that Curtiss-Wright has somehow been delinquent in bringing its claims (GE Brief at 3, 20-21), a non-issue which has never been

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1. In the case at bar, the court of appeals purported to merely rely upon its dictum in *Allis-Chalmers Corp. v. Philadelphia Electric Co.*, 521 F.2d 360, 366 (3d Cir. 1975):

> "In the absence of unusual or harsh circumstances, we believe that the presence of a counterclaim, which could result in a set-off against any amounts due and owing to the plaintiff, weighs heavily against the grant of 54(b) certification."

Curtiss-Wright Corp. v. General Electric Co., 597 F.2d 35, 36 (3d Cir. 1979) (221a).

determined by the district court or the court of appeals and obviously is not before this Court.

Even if the release issue were before this Court, GE's argument on the release issue is patently self-serving. GE cites to New York cases, but fails to mention that the district court based its decision on the most recent New York case which was affirmed by the highest court of the State of New York (164a-172a).[2]

GE's attempt to argue the release issue before this Court is at best injudicious, especially in view of Judge Rosenn's dissent below wherein he concluded that the district court had correctly decided the release issue in Curtiss-Wright's favor. 597 F.2d at 40 (223a, 232a).[3] In addition, documents produced in the litigation to date during discovery reveal that GE's own personnel were concerned over the improper use being made of the release clause as being applied to Curtiss-Wright. They acknowledged that the clause was being used as a "lever" to force Curtiss-Wright to withdraw its other claims against GE. The following are relevant extracts from these documents:

(1) Letter of Phelps (General Electric) to Cardinali (Navy) dated July 14, 1976:

"...The basic issue still remains as to whether [Curtiss-Wright] can pursue identified claims and receive payment of their withholding. This possibility has been denied based on a reading of Navy terms and conditions 604-5, Article 5,

2. *Tufano Contracting Corp. v. Port of New York Authority*, 33 Misc. 2d 1028, 227 N.Y.S. 2d 707 (Sup. Ct. 1962), *aff'd*, 18 App. Div. 2d 832, 237 N.Y.S. 2d 562, *aff'd*, 13 N.Y. 2d 967, 194 N.E. 2d 603, 244 N.Y.S. 2d 643 (1963).

3. Judges Seitz and Aldisert, concluding that the appellate court was without jurisdiction, did not discuss the merits of the issue.

Payments, which requires a release as a condition precedent to final payment. . . . MAO [General Electric] on two occasions . . . has formally recommended acceptance of some form of conditional acknowledgment. This was based on the continuing likelihood that the clause in Article 5 as was being enforced could be found to be unconscionable or otherwise unenforceable. . . ."

(2) Memorandum of Balicki (General Electric) to Phelps (General Electric) dated June 22, 1976:

"With the advent of the (Curtiss-Wright) civil action, MAO (General Electric), for the first time in my recollection, is faced with withholding monies in the face of a substantial claim. This civil action brings to light a dimension to withholding heretofore not recognized by most MAO people: i.e., use of withholding monies to either prevent claims or cause the Seller, due to the amount of the withholding, to capitulate his claims position and grant a release to the Prime [Contractor]."

* * *

"[I]t is my judgment that ANSTR [Navy] is withholding monies to lever/prevent/dismiss vendor claims."

(3) Memorandum of Roberts (General Electric) to Balicki (General Electric) dated June 18, 1976:

"There is nothing wrong with contracting parties agreeing to a withholding clause provided that its purpose is mutually understood and is a

> reasonable amount that prudent businessmen could accept. I can accept the principle of precipitating timely redetermination or insurance of performance; however, I cannot agree in any way that it is a built in club to preclude a legitimate claim or force the withdrawal of a claim submitted."[4]

Parenthetically it should be noted that these documents *and* the Navy letter which GE cites (GE Brief at 5-6 n.2)[5] are devoid of any mention of setoffs, grounds for counterclaims against Curtiss-Wright or any basis for non-payment other than the release clause.

GE's assertion that Curtiss-Wright has somehow been delinquent in filing its claims is yet another attempt to color the issue before this Court with irrelevant argument. In any event, the assertion has no basis in fact. As to Curtiss-Wright's claims for final payment, the first claims became due in November of 1975 (186a). Curtiss-Wright amended its complaint to recover these monies only one year later, in November of 1976 (78a) after attempts at negotiations proved unfruitful (88a, 91a). After Curtiss-Wright completed the remainder of the subcontracts, it expeditiously again supplemented its complaint to include claims for the amounts due (208a). It is thus obvious that there was no delay on the part of Curtiss-Wright in seeking its final payments under the 21 subcontracts.

As to Curtiss-Wright's remaining claims in suit, obviously Curtiss-Wright could not bring an action based on

4. These documents were before the district court on the motion for summary judgment and are reproduced in their entirety in the Court of Appeals Appendix at 151-153, 165-167 and 145-148, respectively.

5. GE's bald-faced insertion of the "Navy" letter is indicative of the manner in which GE makes its argument: (1) the entire subject matter is irrelevant to this appeal; and (2) the whole picture is not given, *i.e.*, GE's own position is omitted.

misrepresentations until it became aware, years later, that the representations were, in fact, false. Before filing suit, Curtiss-Wright attempted to avoid litigation by filing a request for extraordinary relief with the United States Navy under Public Law 85-804, 50 U.S.C. §1491. Only after it became obvious that the Navy was not going to act on Curtiss-Wright's request for relief did Curtiss-Wright institute suit against General Electric. With the litigation now nearing the end of its fourth year, GE has yet to file a motion based on the statute of limitations or laches.

The above points are made to dispose of any possible misunderstanding that GE's allegations as to the merits of the release issue or the timeliness of Curtiss-Wright's claims may be relevant to the issues before this Court. Having so stated, we can now turn to the issues which *are* before the Court.

POINT II

GE HAS ATTEMPTED TO AVOID THE ISSUE RAISED BY THE THIRD CIRCUIT'S DECISION BELOW AND PROFFERS NO VALID REASON WHY ITS PENDING UNADJUDICATED COUNTERCLAIMS SHOULD BAR .THE ENTRY OF FINAL JUDGMENT UNDER RULE 54(b) ON CURTISS-WRIGHT'S ADJUDICATED CLAIMS WHICH ARE FACTUALLY AND LEGALLY UNRELATED TO THE COUNTERCLAIMS.

Let us not lose sight of the fact that the Third Circuit's holding below was based upon its erroneous reasoning that the mere possibility of a setoff posed by GE's unadjudicated counterclaim in effect prohibited the district court from entering final judgments under 54(b) on Curtiss-Wright's adjudicated and liquidated claims totalling nearly $19,000,000. For the reasons set forth in the CW Brief, Curtiss-Wright maintains that the Third Circuit has, for all practical purposes, erected the pending counterclaim as a barrier to the entry of final judgment on

adjudicated claims totally unrelated to the counterclaim. This result is (1) contrary to the plain language of Rule 54(b), (2) contrary to precedent, and (3) inimical to sound judicial administration. *See* CW Brief at 20-34.

In its answering brief, GE not only misstates the holding of the Third Circuit,[6] but additionally attempts to obfuscate the issue by deliberately misconstruing Curtiss-Wright's position on the consideration to be given an unadjudicated counterclaim in the Rule 54(b) determination process. GE also engages in a strained and an essentially irrelevant discussion of "piecemeal appeals"[7] in a further attempt to divert the Court's attention from the obvious fact that but for the Third Circuit's concern about a possible setoff,[8] it would not have held that the district judge abused his discretion under Rule 54(b) in this case.

It is *not* Curtiss-Wright's position that the district judge below need not have considered the unadjudicated counterclaim in his determination to enter final judgment on Curtiss-Wright's claims for final payment.[9] As discussed in *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427 (1956) (hereinafter "*Sears*") and *Cold*

6. *See* Point I, *supra*, at 2.

7. GE's misinterpretation of the policy against piecemeal appeals in its application to this case is discussed in Point III, *infra*, at 15-18.

8. The Third Circuit below held:

> "[O]f decisive significance, it is tacitly conceded that the only harsh circumstance presented here is Curtiss's inability to use the money from the judgment. The result is indeed harsh from Curtiss's viewpoint, but what if GE prevails on its compulsory counterclaim? How is its loss resulting from the deprivation of the money to be restored?" 597 F.2d at 36.

9. GE erroneously attributes a contrary position to Curtiss-Wright. *See* GE Brief at 11, 34.

Metal Process Co. v. United Engineering & Foundry Co., 351 U.S. 445 (1956) (hereinafter "*Cold Metal*"), before entering a final judgment on a single claim in a multiple claims case, the district judge must analyze the underlying facts and legal issues presented by the unadjudicated claim, including any unadjudicated counterclaims. If the adjudicated and unadjudicated claims can be decided independently of one another so that an immediate appeal of the former will neither be premature nor disruptive of the proper adjudication of the latter, the district judge is then free to enter a final judgment under the rule when, in his discretion, justice so requires.[10]

Curtiss-Wright does not quarrel with the premise that the counterclaim must be carefully considered by the district judge. It is the manner of such consideration that caused the Third Circuit to fall into error. Under Rule 54(b), even a compulsory counterclaim is to be considered in the same manner as any other unadjudicated claim, not as some sort of special barrier to 54(b) certification. This is the clear holding of *Cold Metal*. 351 U.S. at 452. As Professor Moore has noted:

> "[I]t is immaterial whether the counterclaim is compulsory or permissive, except as the *relationship* of the counterclaim to the claim bears upon the district court's *discretion* in making the [Rule 54(b)] certificate."[11]

10. *See Bendix Aviation Corp. v. Glass*, 195 F.2d 267, 272 (3d Cir. 1952) *(en banc)* (hereinafter "*Bendix*"). The Third Circuit in raising the jurisdictional question on its own motion in *Allis-Chalmers*, apparently overlooked *Bendix* which is cited with approval in *Cold Metal*, 351 U.S. at 452, and instead cited to *Panichella v. Pennsylvania Railroad Co.*, 252 F.2d 452 (3d Cir. 1958). As will be discussed in Point IV, *infra*, at 20-21 the court's reliance on *Panichella*, a case involving claims unquestionably interrelated in law and fact, was misplaced.

11. 6 *Moore's Federal Practice*, ¶ 54.35[1] at 584 (2d ed. 1976) (emphasis added).

In the present case, the district judge carefully made the analysis required by *Sears* and *Cold Metal* and determined that the adjudicated and unadjudicated claims were sufficiently independent, factually and legally, to warrant the exercise of his discretion under the rule (197a-198a).[12] In addition, the district judge found that a failure to enter final judgments on Curtiss-Wright's claims for final payment for goods sold and delivered would work a substantial injustice. The Court noted that it might take years to resolve the remaining unadjudicated claims in suit and for that period of time Curtiss-Wright would lose the benefits of its judgment, as exemplified by the disparity between the legally mandated prejudgment interest rate of 6 percent simple interest per year and modern day interest rates.[13] Curtiss-Wright maintains that in light of the district court's undisputed finding that Curtiss-Wright's adjudicated claims can be properly decided independently of GE's counterclaims, and all other claims in suit, the Third Circuit misconstrued Rule 54(b) in holding that the possibility of a setoff was a barrier to the entry of final judgment on Curtiss-Wright's adjudicated claims, the amounts of which are not in dispute.

Like the Third Circuit, GE never articulates a sound reason why a mere potential setoff constitutes "a just reason for delay" under Rule 54(b). To the contrary, there is a possibility that the setoff will not materialize or that Curtiss-Wright will recover on its remaining claims in suit in an amount exceeding a recovery on the counterclaims, if any.[14] If the setoff does not materialize,

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12. The court of appeals did not question this portion of the district court's opinion. Nor did GE contest this determination by the district court in the court of appeals.

13. For a more comprehensive discussion of factors which overwhelmingly support the district court's entry of final judgment in this case, *see* Point V, *infra*, at 24-27.

14. *See* Judge Gibbons' dissenting opinion sur denial of the petition for rehearing. 599 F.2d at 1263 (257a).

then Curtiss-Wright will never be able to recover the economic loss suffered by the delay in payment.[15]

As we have noted (CW Brief at 26-27), outside the Third Circuit, the courts in appropriate cases have not hesitated to enter final money judgments on adjudicated claims despite pending counterclaims, and Rule 62(h) is available to address the Third Circuit's concerns as to "who should hold the money." If the framers of the rules had intended the factors relating to enforcement to be considered under Rule 54(b) as well as Rule 62(h), it seems unlikely that the original Rule 54(b) would have been amended to move the enforcement provisions to Rule 62(h). Even if GE were correct that some Rule 62(h) factors can also be considered under Rule 54(b) (GE Brief at 40), an abuse of discretion can hardly be found if the district court has chosen the obvious path rather than the obscure one.

GE never comes to grips with the counterclaim issue. Instead, in attempting to avoid the issue GE has painted itself into a corner by taking the ludicrous position that *even if no counterclaims were pending* Curtiss-Wright would nevertheless be required to meet some ill-defined standard of "hardship" in order to obtain a final judgment on its adjudicated claims while its unadjudicated claims are pending. This position finds support neither in logic nor in precedent, even in the Third Circuit.[16] It

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15. On the other hand, GE, as a "cost plus" prime contractor of the Government (272a), has been reimbursed by the Government for its "out-of-pocket" losses and will retain this money whether or not it prevails on its counterclaims. It will also be reimbursed for the final payments to Curtiss-Wright and receive its fixed fee thereon.

16. *See Tilden Financial Corp. v. Palo Tire Serv., Inc.*, 596 F.2d 604 (3rd Cir. 1979), *discussed in* Point I, *supra*, at 3. Other circuits have taken appeals under Rule 54(b) in cases where no counterclaim was pending without noting any special harsh circumstances or "irreparable injury." *See, e.g., Selk v. St. Paul Ammonia Products, Inc.*, 597 F.2d 635, 636 (8th Cir. 1979); *Jones v. Menard*, 559 F.2d 1282, 1284 n.1 (5th Cir. 1977); *Monarch Asphalt Sales Co. v. Wilshire Oil Co. of Texas*, 511 F.2d 1073, 1077 (10th Cir. 1975); *Bushie v. Stenocord Corp.*, 460 F.2d 116, 118 n.2 (9th Cir. 1972).

defies common sense to suggest that a party should be deprived of the benefits of its judgment simply because it has other unrelated claims against the same defendant. In addition, it is manifest that GE's "hardship" requirement, tantamount to "irreprarable injury" (*see* Point III, *infra*), in cases where no counterclaims are pending would be avoided by litigants with little difficulty.[17]

Near the end of its brief (GE Brief at 34), GE finally attempts to address the erroneous reasoning of the Third Circuit in this case, but can cite no valid precedent in support of the Third Circuit's position that a counterclaim, posing the possibility of a setoff, is in and of itself, a barrier to the entry of final judgment on factually and legally unrelated claims.[18] For example, in *Gaetano Marzotto & Figli, S.P.A. v. G. A. Vedovi & Co.*, 28 F.R.D. 320, 324 (S.D.N.Y. 1961) (cited in GE Brief at 34) the court declined to enter final judgment on plaintiff's adjudicated claims. But the court nowhere based its determination on a possibility of a setoff posed by the counterclaims. Rather, the court undertook the analysis required by *Sears* and *Cold Metal* and determined that it could not satisfy itself that plaintiff's claims and the counterclaims were not "so closely related to be inherently inseparable." To the same effect is *Bethlehem Steel Corp. v. Tishman Realty & Construction Co.*, 72 F.R.D. 33, 34, 40 (S.D.N.Y. 1976) (cited in GE Brief at 34) where the court also noted that even a compulsory counterclaim was not an absolute bar to the entry of summary judgment for the price of goods sold and delivered.[19]

17. Courts could anticipate all types of maneuvers to avoid joining claims, such as actions brought at different times or in different jurisdictions. In the end, such a result would frustrate judicial economy rather than promote it.

18. Though GE refers to its counterclaim as "substantial" and notes that it survived a motion to dismiss, it should be noted that the motion was premised on GE's alleged "failure to state a claim" and was based only on the pleadings themselves (173a-174a). Thus, the substantive merits of GE's counterclaim have never been ruled upon by the district court.

19. *TPO Incorporated v. Federal Deposit Insurance Corp.*, 487 F.2d 131 (3rd Cir. 1973), also cited by GE (GE Brief at 33), does little to support GE's position, as discussed in CW Brief at 22 n. 21.

GE also cites Professors Wright and Miller as taking the position that it is undesirable to award a judgment that may have to be returned. This is an erroneous citation. What GE has referred to is merely Wright and Miller's notation, based on the dictum in *Schroeter v. Ralph Wilson Plastics, Inc.*, 49 F.R.D. 323 (S.D.N.Y. 1964), to the effect that "presumably" it is undesirable to award an amount which may have to be returned. 10 Wright & Miller, *Federal Practice & Procedure*, §2659 at 82 and n. 72 (1973). GE, however, conveniently leaves out the word "presumably" in its paraphrasing of the text. Moreover, the brief comment in *Schroeter* merely states that the counterclaim may have some relevance, but the court clearly did not hold that it was dispositive since it explicitly stated it would consider a Rule 54(b) application in that case although counterclaims were pending. Curiously, in *Allis-Chalmers*, the Third Circuit chose to cite "authority" such as *Schroeter*, while ignoring cases such as *Sears*, *Cold Metal* and *Bendix*.

In the end, GE is reduced to arguing that its counterclaims are "compulsory" (GE Brief at 39), a fact which, as *Cold Metal* makes clear, is of no consequence in the Rule 54(b) determination process.[20] GE's vague statement that the Third Circuit, when it considers the release issue, will be required "to delve in some degree into the relationship of the parties and

20. GE's attempt to limit *Cold Metal* to its facts is unpersuasive. No court has done so, and in appropriate cases courts have entered final judgments under Rule 54(b) in the face of pending counterclaims. *See* CW Brief at 26-27 nn. 25-27, 29. *Cold Metal* itself does not purport to deal with a unique situation; rather *Sears* and *Cold Metal* lay down guidelines for the application of Rule 54(b) which are to be followed in every case. In fact, the Court in *Cold Metal* made it clear that the same considerations governing the district court's discretion under the rule are relevant to cases where counterclaims may be pending. GE's characterization of the counterclaim in *Cold Metal* as "ancillary" is meaningless. The word "ancillary" in *Cold Metal* refers to the jurisdictional basis of the counterclaim and has nothing to do with the factual and legal relationship between the claims which constitutes the basis of the Rule 54(b) determination.

some of the circumstances underlying their broad ranging dispute" (GE Brief at 39) is unsupportable and directly contradicted by the district judge's express determination, unchallenged by the Third Circuit, that the facts and legal issues involved in Curtiss-Wright's adjudicated claims are unrelated to any of the other claims in suit. GE's assertion is nothing more than a last minute attempt to find some relevant connection where none exists between Curtiss-Wright's adjudicated claims for final payment and GE's unadjudicated counterclaim. In the court of appeals, GE never contended that there were any factual or legal issues relevant to any of the remaining claims in suit, including the counterclaim, which had to be resolved before the Third Circuit could properly consider the release issue. GE's statement represents nothing less than a blatant recognition on GE's part of the weakness of the arguments that it has made before this Court.

As we have demonstrated, Rule 54(b) provides that the district court may enter final judgment on less than all of the claims in suit when the adjudicated claims are unrelated to the unadjudicated claims. GE has failed to demonstrate any basis to justify the Third Circuit's establishment of a counterclaim as a virtual *per se* barrier to Rule 54(b) certification in civil damage actions.

POINT III

RULE 54(b)'S "NO JUST REASON FOR DELAY" STANDARD PROVIDES A SOUND BASIS FOR JUDICIAL ADMINISTRATION, AND GE'S CONTENTION THAT RULE 54(b) REQUIRES A SHOWING OF IRREPARABLE INJURY IS PATENTLY CONTRARY TO THE CLEAR LANGUAGE AND THE INTENT OF THE RULE AND REFLECTS GE'S DISTORTED VIEW OF THE POLICY AGAINST PIECEMEAL APPEALS.

It cannot be disputed that the orders certified by the district court under Rule 54(b) in this case constitute the final disposition of an entirely separate and distinct claim for relief. This case does not present an interlocutory appeal of an issue within a single claim.[21]

GE, however, seeks to blur the distinction between an appeal from a final decision disposing of a separate claim in a multiple claims action, as is the case here, and an interlocutory appeal from a non-final order. GE would have this Court arbitrarily apply an "irreparable harm" standard, which is sometimes applied to interlocutory appeals within a single claim, to appeals from *final judgments* entered under Rule 54(b). Such a result is not only unsupported by precedent but is at odds with the goals Rule 54(b) seeks to accomplish. Moreover, GE seeks to invoke the policy against piecemeal appeals in a case where it has no application (GE Brief at 17, 31).

Rule 54(b) obviously envisions that in some cases justice may require more than one appeal where distinctly separate claims are involved. In a case, such as the present one, where the appeal on the adjudicated claims will not adversely affect in any way the dispositior of the remaining claims or lead to duplicative or unnecessary appellate review there is simply no basis to apply the policy against piecemeal appeals.

21. Thus, GE's reliance on cases such as *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), is misplaced. In that case the Court was confronted with a classic interlocutory appeal of an issue within a single claim for relief.

As far as precedent is concerned GE ignores the obvious fact that in neither *Sears* nor *Cold Metal* did the Supreme Court even imply, let alone explicitly adopt a standard of "irreparable injury" restricting the district judge's discretion under the rule. Instead, the Court reasoned that the role of the district judge under the rule should be viewed as one of a "dispatcher" to determine the appropriate time when a separate claim in a multiple claims action is ready for appeal since he is "the one most likely to be familiar with the case and with any justifiable reasons for delay."[22] 351 U.S. at 435, 437. As *Sears* and *Cold Metal* make clear, it is the concept of an independent or separable claim which is at the heart of the district court's discretion under Rule 54(b), adopted specifically in response to the liberal joinder of claims permitted by the Federal Rules of Civil Procedure.[23]

The Supreme Court decisions which GE has elected to call to the Court's attention provide little, if any, guidance in the multiple claims context of Rule 54(b). They are all decisions within the context of appeals or writs of mandamus within a single claim.[24] GE's argument is nothing more than an attempt

22. The Court in *Sears* noted that the timing of the appeal is "vested by the rule *primarily in the discretion of the district court.*" 351 U.S. at 437 (emphasis added). In the present case the Third Circuit has improperly substituted its judgment for that of the district court and has erected a standard of "unusual or harsh circumstances" which actually *divests* the district court of practically all of its discretion.

23. *Sears*, 351 U.S. at 432-433.

24. GE's citation to Justice Frankfurter's opinion in *DiBella v. United States*, 369 U.S. 121 (1962), in this context is misleading (GE Brief at 31). Justice Frankfurter simply noted the "collateral order doctrine" and Rule 54(b) as two instances in his list of exceptions to the final judgment rule. He was not suggesting that Rule 54(b) was governed by the collateral order doctrine's standard of irreparable injury. Rather, as Justice Frankfurter noted, all the exceptions to the policy against piecemeal appeals have at least one factor in common, namely the independence or severability of the issue on appeal from all other issues in the case. 369 U.S. at 126.

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to turn the policy against piecemeal appeals, a policy of practical application, into one of arbitrary dogma that GE would apply even in cases such as the present one, where the appeal on the release issue would in no way adversely affect the disposition of the remaining claims in suit nor cause unnecessary or duplicative appellate review.

Nor is there any merit to GE's contention that the district court's entry of final judgment in this case would open the floodgates to piecemeal appeals or make money judgments appealable as a routine matter. In most multiple claims cases the facts and legal issues involved in the adjudicated and unadjudicated claims will be sufficiently interrelated to make premature an early appeal on the adjudicated claims. It will be the relatively rare instance which presents facts such as are before the Court in this case. Moreover, it is *not* Curtiss-Wright's position that Rule 54(b) requires the district judge to enter a final judgment in every instance where the adjudicated claim is independent of the pending claims. The rule by its very language is discretionary. Rather, the district judge should exercise his discretion to enter final judgment under the rule only when in his view justice so requires under all the circumstances of the case before him. *See United Bank of Pueblo v. Hartford Accident & Indemnity Co.*, 529 F.2d 490 (10th Cir. 1976). We submit that this is the clear mandate of the rule's "no just reason for delay" language.

It is thus clear that there are no underlying facts presented in this case from which GE can construct a valid argument that the policy against piecemeal appeals has any application here. In addition, GE has articulated no valid reason why a standard of

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In this regard, it should be noted that in *Huckeby v. Frozen Food Express*, 555 F.2d 542 (5th Cir. 1977), cited in GE Brief at 15, the court ruled that appellant could not demonstrate irreparable injury under the collateral order doctrine, but nevertheless remanded the case to the district court to determine whether Rule 54(b) certification should be entered, the implication being that Rule 54(b) is *not* governed by a standard of irreparable injury.

"irreparable injury" should be applied. As will be discussed in Point IV, *infra*, GE's attempt to use the "infrequent harsh case" language found in the Advisory Committee Note to the 1946 Amendment to Rule 54(b) as a makeweight for its "irreparable injury" argument is as unpersuasive as the argument itself.

POINT IV

GE SEEKS TO HAVE THE LANGUAGE OF THE ADVISORY COMMITTEE REPLACE THE LANGUAGE OF THE RULE AND TO GIVE THE ADVISORY COMMITTEE LANGUAGE AN INTERPRETATION SO RESTRICTIVE AS TO RENDER THE RULE ITSELF A NULLITY.

Let us first put the "infrequent harsh case" language of the Advisory Committee Note to the 1946 Amendment to Rule 54(b), 5 F.R.D. 433, 472-73 (hereinafter "Committee Note") in its proper perspective. While it may well be, as one commentator has concluded, that the language was inadvertent,[25] we have noted that the Committee Note is primarily concerned with the problem that existed under original Rule 54(b) as it was enacted in 1937 (CW Brief at 32-33 n.37). Under the original rule it was unclear to many litigants as to when the time for appeal began to run, and because of this confusion many appeals were taken from interlocutory orders disposing of only a portion of the action "although a trial remained to be had on other claims similar or identical with those disposed of." Committee Note, 5 F.R.D. at 472-73. Bearing in mind, therefore, the particular problem for which a solution was sought, the Committee Note's "infrequent harsh case" language most likely simply reflects the Committee's concern that the finality rule not be undermined by the certification of claims so closely related to the unadjudicated claims as to violate the policy against piecemeal appeals. Such an interpretation of the language would of course be entirely consistent with *Sears* and *Cold Medal*, as well as *Bendix*.

25. Note, 54 N.C.L. Rev. 1265, 1272-73 (1976).

Notwithstanding the interpretation one may give to the Committee Note, it is obvious that the meaning of the rule is abundantly clear from the language of the rule itself and the teachings of *Sears* and *Cold Metal*. The Committee Note is now over 30 years old and subsequent to its publication two decisions of the United States Supreme Court have interpreted the 1946 Amendment to the rule. It is a fundamental principle in the construction of any statute or rule that one looks first to the plain language of the rule and to the decisions, in the case of the Federal Rules of the United States Supreme Court.[26] Speculation as to the weight, if any, to be given to the "infrequent harsh case" language in the Note would be of little utility. This language was neither enacted by Congress nor adopted by the Court and should not be interpreted by lower courts in a manner so as to permit them to ignore the plain language of the rule and the decisions of this Court, and to, in effect, write their own rule, which is exactly what the Third Circuit has done in this instance.

GE would have us believe that the Committee Note interprets the rule as one to be utilized only where needed to prevent "irreparable harm." There is absolutely nothing in the language of the rule or *Cold Metal* or *Sears* to lead us to accept that conclusion, nor is there anything to bring us to that conclusion in the Advisory Committee Note to the 1961 Amendment to Rule 54(b),[27] 28 U.S.C.A. Fed. R. Civ. P. 54(b), which states:

26. "[I]n this instance the issue concerns the construction and application of the Federal Rules of Civil Procedure. It is thus appropriate for us [the Supreme Court] to determine on the merits the issues presented and to formulate the necessary guidelines in this area." *Schlagenhauf v. Holder*, 379 U.S. 104, 112 (1964).

27. In 1961, Rule 54(b) was once again amended to cover multiple parties situations as well as multiple claims situations.

> "This rule permitting appeal, upon the trial court's determination of 'no just reason for delay,' from a judgment upon one or more but fewer than all the claims in an action, has generally been given a sympathetic construction by the courts and its validity is settled. *Reeves v. Beardall*, 316 U.S. 283 (1942); *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427 (1956); *Cold Metal Process Co. v. United Engineering & Foundry Co.*, 351 U.S. 445 (1956)."

Obviously the Committee in 1961 was not of the view that the Court in *Sears* or *Cold Metal* had misinterpreted the intended meaning of the rule.

In their preoccupation with placing the most onerous construction possible on the rule through the 1946 Committee Note, GE and the Third Circuit completely ignore the fact that the district court in this case followed the rule with utmost care and made an abundance of findings supporting its conclusion that there is "no just reason for delay." It cannot be seriously argued that the district court judge had no basis for said finding nor can it be argued that in this case there exists any "just reason for delay." There simply is not.

The cases cited by GE quoting the "infrequent harsh case" language of the Committee Note (GE Brief at 15) do nothing to support GE's position. In reading the cases cited by GE one cannot help but notice that they all involve appeals from *dismissals* of a claim. Thus the injustice involved in the delay of entry of a final affirmative judgment such as the money judgment in this case, was not a factor in any of the cases cited by GE. The second obvious fact to be noted is that none of those cases adopt GE's proposed standard of "irreparable injury."

Lastly and of utmost significance is the fact that in those cases cited by GE where an appellate court found an abuse of

discretion by the district court under Rule 54(b), the conclusion was reached only after a determination by the appellate court that the adjudicated and unadjudicated claims were so inextricably interwoven that an immediate appeal would be premature because of the possibility of duplicative appellate review or mootness, or that delay of the trial of the unadjudicated claims would be the only result of an appeal. *See, e.g., Brunswick Corp. v. Sheridan*, 582 F.2d 175, 183-85 (2d Cir. 1978); *Panichella v. Pennsylvania Railroad Co.*, 252 F.2d 452 (3d Cir. 1958) cited in GE Brief at 15. Indeed, *Brunswick Corp. v. Sheridan, supra*, makes crystal clear that the determination of whether the district court has abused its discretion turns on the factual and legal relationship between the adjudicated and unadjudicated claims:

> "[W]e can readily dismiss [from discussion] cases where decision on the appealed claim in no way turned on the result of the pending claim, so that on any resolution of the pending claim the court's determination of the appealed issue would stand and did not have to be made in the alternative. . . . The pertinent cases are those involving multiple claims as closely interrelated as those here; there this court has dismissed appeals for abuse of discretion in the 54(b) determination." 582 F.2d at 185.

In view of what has been stated above and, if in the light of *Sears, Cold Metal* and *Bendix* and the 1961 Advisory Committee Note, there remains any necessity whatsoever to attempt to further clarify the 1946 Committee Note, it would be wiser to view it in a manner consistent with the language of the rule and the decisions of the Supreme Court instead of reading it as GE does to, in reality, amend the rule by inserting an unintended "irreparable harm" standard.

Regardless of the Committee Note, the Supreme Court decisions and the language of the rule itself make clear that

certification under Rule 54(b) was intended to solve the problems of complex litigation (such as this case):

Where joinder of multiple claims are involved (such as in this case);

Where a claim exists which has been finally adjudicated and is separate, distinct and independent of all other claims and counterclaims in the lawsuit (such as in this case);

Where certification will not prevent the rest of the case from being prepared for trial and the need for review will not be mooted by any future developments in the district court (such as in this case);

Where the same issue will not arise on appeal more than once (such as in this case);

Where because of the complexity and magnitude of the remaining claims the litigation will be extremely lengthy (such as in this case);

Where the district court has determined that the counterclaim with its mere possibility of setoff is under all of the circumstances not a reason for delay in certification (as in this case);

Where the holder of the unadjudicated claim will be deprived of his property for a lengthy period of time and suffer obvious loss while the unadjudicated claims of both parties are being litigated (such as in this case); and

Where the district court has determined injustice would result from delay and finality of judgment would advance the interest of sound judicial administration and justice to the litigants (such as in this case).

If, in fact, detailed guidelines are needed to establish parameters for the district court's discretion in determining "no just reason for delay," have they not been satisfied, as set forth above, and would not a definition of "infrequent harsh case" consistent with the above, should it be necessary to even have such a definition, be one that would be entirely consistent with the language of the rule and the prior Supreme Court decisions?

No court outside the Third Circuit has applied the rule in the manner in which it has been applied in this case by the appellate court. We have cited numerous cases (CW Brief at 26-27 nn. 25-27, 29) where certification was made on the basis of "no just reason for delay," where no mention was made of harsh circumstances and where there hardly could have been presented "harsh circumstances" which would have been sufficient under the virtually insurmountable barrier which the Third Circuit seeks to set forth as a standard for Rule 54(b) certification.

The Third Circuit decision if sustained by this Court would, to paraphrase the words of Judge Gibbons in his dissent sur the denial of the petition for rehearing below, sharply limit the effective use of Rule 54(b) with resulting harm both to litigants and to the ability of district judges to expedite the disposition of cases. 599 F.2d at 1260 (248a, 249a). We submit that GE's interpretation of Rule 54(b) would, if adopted, completely destroy its utility.

POINT V

GE'S DISCUSSION OF STATUTORY INTEREST RATES IS INAPPROPRIATE TO THE CASE BEFORE THE COURT, AND THE INJUSTICE TO CURTISS-WRIGHT FROM THE DELAY IN ENTRY OF FINAL JUDGMENT IS CLEAR.

GE in making a legalistic argument regarding interest rates seeks by slight of hand to distract attention from the fact that the district court in this case utilized Rule 54(b) exactly as the rule was intended, to render justice to litigants.

GE attempts to construct some sort of argument that the district court has impermissibly prescribed a higher interest rate than that provided by the state legislature by entering final judgments on Curtiss-Wright's claims for final payment (GE Brief at 23). This argument is nothing more than a red herring. The district judge in this case was not pre-empting or seeking to change New York prejudgment interest law as GE contends. The court was simply acknowledging the fact that because the adjudication of the remaining claims may take years to complete, the prejudgment interest rate which is fixed by law at rates considerably lower than modern day rates, *see* CW Brief at 19 & n.17, would be unnaturally and unfairly extended well beyond the time when the judgments were actually entered.[28]

Any court would have acted well within its discretion under Rule 54(b) in certifying a claim where only a few of the facts set forth below existed. In this case the litany of factors favoring certification is overwhelming:

(1) Curtiss-Wright has delivered all of the equipment required by the 21 subcontracts in suit; this equipment has either

28. In this regard it should be noted that Rule 54(b) certification in this case would have at least started the running of postjudgment interest, *see* CW Brief at 12 n.6, which would be 8 percent under N.J. Civ. Prac. Rule 4:42-11(a) thereby saving Curtiss-Wright approximately $380,000 per year.

been put to use by GE and the government or is available for their use; there has been no claim made in this litigation that the equipment delivered is in any way defective. The end result is that a failure to certify permits the purchaser of the equipment, GE, the full benefit of its contracts whereas Curtiss-Wright, although it has been adjudged entitled to the monies representing its claims for final payment under those contracts must forego the benefits of its judgments while the parties continue to press their remaining claims against each other in this extensive and prolonged litigation.

(2) Curtiss-Wright in its claims for final payment seeks only those amounts which GE agreed to pay when it entered into the subcontracts. Some of these final payments have been due and owing since November of 1975.[29]

(3) Not only is GE's counterclaim factually and legally unrelated to Curtiss-Wright's claims for final payments but it seeks to recover only $1.9 million in alleged losses; the remainder of GE's $54,000,000 counterclaim is for unjust enrichment which represents neither alleged losses incurred by either GE or the Government, nor any fund of GE which Curtiss-Wright is improperly holding (264a-282a).[30]

(4) As the district judge noted, Curtiss-Wright will suffer daily financial losses for perhaps years[31] if it is unable to execute

29. In Point I, *supra*, at 4-6 we noted that GE's own personnel have viewed the withholding of the final payments as an attempt to force the withdrawal of Curtiss-Wright's remaining claims.

30. Although GE seeks $54,000,000 in "unjust enrichment," it nevertheless concedes that Curtiss-Wright has lost substantial sums in the performance of the 21 subcontracts. GE Brief at 2.

31. Because the remaining issues in suit are extremely complex, discovery will be lengthy As of the date of this brief, neither a trial date nor a date on which a trial date will be set have been determined.

on its judgments for final payment, as exemplified by the disparity between the legally required prejudgment interest rate and the substantially higher interest rates prevalent in today's marketplace.[32] The district judge might just have easily noted the economic loss to Curtiss-Wright caused by the unusually high and protracted present rates of inflation. Moreover, as Judge Rosenn noted in his dissent the loss of the use of nearly $20.000,000 in the operations of even a large corporation such as Curtiss-Wright is a significant detriment.[33] 597 F.2d at 38 (226a).

(5) The failure to enter final judgment achieves the result of permitting Curtiss-Wright's adversaries to finance the litigation with Curtiss-Wright's money.

(6) If GE has valid reasons why a stay of execution should be entered, they may be presented to the court under Rule 62(h).[34]

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32. GE, apparently adopting the Third Circuit's onerous and ill-defined standard of "unusual or harsh circumstances," contends that Curtiss-Wright has not demonstrated that it is on the brink of insolvency and is therefore not entitled to final judgment on its claims for final payment. GE Brief at 7. We must state that GE has wasted a great deal of time trying to knock down this straw man. For the record, Curtiss-Wright admits that it is solvent. The issue before this Court, however, is whether the district court under all the circumstances abused its discretion when it concluded that there would be a denial of justice from a failure to enter final judgment.

33. GE contends that the substantial amount of the judgments involved in this case cannot be a basis for Rule 54(b) certification because such a result would favor the "wealthy" over the "needy" (GE Brief at 21). The argument is a misstatement of Curtiss-Wright's position. Determinations under Rule 54(b) must be based upon the facts and circumstances presented by the individual case before the court. In other cases, justice may indeed require that a final judgment be entered even when the amount of the judgment involved is less than the substantial amount presented by this case.

34. We have noted (CW Brief at 25-29) that factors relating to the enforcement of judgments such as a possible setoff presented by a pending counterclaim are appropriate for consideration under Rule 62(h). In its brief

(Cont'd)

These factors cannot be disposed of by GE's irrelevant argument regarding interest rates. The situation as it presently exists is unjust and requires redress. There is no doubt that under the facts and circumstances presented by this case, the district court in entering its final judgment orders under Rule 54(b) did not abuse its discretion but acted in the interests of justice.

(Cont'd)

GE totally mischaracterizes Rule 62(h) (GE Brief at 40). The rule is not one which authorizes stays pending an appeal of adjudicated claims, a stay which would normally be of short duration. Rather, the rule authorizes the district court to stay the enforcement of adjudicated claims pending the disposition of any of the remaining claims in suit.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the Brief for Petitioner, the judgment of the Third Circuit Court of Appeals (262a) should be vacated, and the case should be remanded to the court of appeals with a direction to reinstate the orders of final judgments of the district court entered on July 28, 1978 (200a) and August 29, 1978 (214a) respectively.

Respectfully submitted,

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